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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. .....

AMERICAN CAST IRON PIPE COMPANY,
Petitioner,
vs.
RUSH PETTWAY, et al.,
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

J. FREDERIC INGRAM
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000
Counsel of Record for Petitioner, American Cast Iron Pipe Company

D. FRANK DAVIS
JOSEPH W. LETZER
F. A. FLOWERS, III
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000
Attorneys for Petitioner, American Cast Iron Pipe Company

OF COUNSEL:
THOMAS, TALIAFERRO, FORMAN,
BURR & MURRAY
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

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APPENDIX A

Opinion of U.S. Court of Appeals, 5th Cir., dated April 29, 1974 ("*Pettway* III")

Rush PETTWAY et al., etc., Plaintiffs-Appellants,

v.

AMERICAN CAST IRON PIPE COMPANY,
Defendant-Appellee,

United States Equal Employment Opportunity
Commission, Intervenor.

No. 73-1163.

United States Court of Appeals, Fifth Circuit.
April 29, 1974.

Rehearing and Rehearing En Banc Denied
May 22, 1974.

Black employees of a manufacturer of cast iron and ductile iron pipe and fittings brought a class civil rights action for equitable relief and damages, including back pay, for various allegedly discriminatory employment practices. The United States District Court for the Northern District of Alabama, at Birmingham, Seybourne H. Lynne, J., ordered and approved a plan for desegregating a governing board of the employer, 332 F.Supp. 811, but, in a separate opinion, denied all other requested relief except attorney fees and costs, and the employees appealed. The Court of Appeals, Tuttle, Circuit Judge, held inter alia, that testing and educational requirements which had been imposed by the employer in the past for hiring, promotion and transfer and entry into the employer's apprentice and on-the-job training programs had been discriminatory as having an adverse effect upon the employment opportunities of blacks; that the consequences of such past discrimination were currently being carried forward by otherwise neutral practices of departmental seniority and bidding and posting procedures which determined promotion, age requirements for entry into the company's apprentice programs and departmental bidding utilized for selection of on-the-job trainees; and that both injunctive relief and the award of back pay were therefore justified.

Reversed and remanded for further proceedings.

Bell, Circuit Judge, concurred specially and filed opinion.

Before TUTTLE, BELL and GOLDBERG, Circuit Judges.

TUTTLE, Circuit Judge:

This complex, class action employment discrimination suit was filed on May 13, 1966 under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e et seq., and 42 U.S.C.A. § 1981. The racial discrimination charges are derived from complaints filed on November 22, 1965 with the Equal Employment Opportunity Commission.

Introduction

Although the path of this law suit is strewn with the corpses of intermediate decisions,[1] the posture of the present cases on appeal will hopefully allow final resolution. In order to accomplish this the opinion must unfortunately be long and complex.

On July 22, 1969 plaintiffs requested a restraining order to prevent the defendant from vacating the offices of several black employees on the Auxiliary Board, a company governing board composed of black employees, and a declaratory judgment that segregation of black and white employees on two governing boards is in violation of Title VII, 42 U.S.C.A. § 2000e et seq. The district court agreed with the plaintiffs and directed the defendant to prepare a plan to eliminate the racial restrictions on the Board of Operatives, the Board of white employees, and to disestablish the separate black Auxiliary Board. The court adopted the defendant's reorganization plan, overruling the ob-

[1]In addition to the suits under discussion, the following actions have evolved. The district court dismissed the initial complaint on March 10, 1967 because the EEOC had failed to attempt conciliation prior to the filing of the case with the district court. On appeal with several other actions, we reversed. Dent v. St. Louis-San Francisco Railway Co., 406 F.2d 399 (5th Cir. 1969). During the pendency of appeal, the defendant discharged one of the named plaintiffs. After the district court denied relief to this plaintiff, we reversed, directing the district court to order that this plaintiff be reinstated, back pay be awarded, and any necessary protective orders be issued. Pettway and Wrenn v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969).

jections filed by the plaintiffs. 332 F.Supp. 811 (N.D. Ala. 1970).

When the employee discrimination charges were tried in October, 1971, the district court held that the testing conducted by the company did not pass muster under Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and had an *adverse impact* on the employment opportunities of black employees. The district court, nevertheless, then denied all requested relief, except for an award of attorney's fees and costs.

The plaintiffs-appellants appeal from these two decisions on the following grounds: (1) refusal to enjoin the company from requiring improper test and educational requirements, (2) failure to require restructuring of the departmental seniority system and the posting and bidding procedure for job vacancies based on the departmental seniority system, (3) failure to order red circling and advance entry for discriminatees,[2] (4) refusal to require changes in the apprenticeship and on-the-job training in the crafts programs, (5) refusal to remedy unlawful exclusion of blacks from supervisory positions, (6) granting inadequate relief in desegregating the company's employees management board, and (7) failure to award back pay.

Defendant-appellee, American Cast Iron Pipe Co., incorporated under the laws of the State of Georgia with its principle place of business in Birmingham, Alabama, is engaged in the production of cast iron and ductile ironpipe and fittings and various other miscellaneous cast iron and steel products. As of August 12, 1971, the company employed 2,551 persons of whom 927 were black.[3]

Plaintiffs-appellants have brought this action on their own

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[2]The terms "red circling" and "advance entry" will be defined in the discussion *infra*.

[3]The company employed 1,792 persons in 1965, approximately equally divided between blacks and whites. The total employment for the company enjoyed continual increase up to 1970. The number of blacks employed, however, decreased until 1969 and in August, 1971 only slightly exceeded the 1965 level, while the number of white employees had almost doubled.

behalf and on the behalf of other persons similarly situated pursuant to Federal Rules of Civil Procedure 23(b)(2).[4] The class of persons represented by plaintiffs-appellants are "those negro employees of defendant employed as of May 13, 1966 and negro persons who have been employed subsequent to May 13, 1966 who have been, continued to be, or in the future will be denied equal employment opportunities by defendant on the ground of race or color."[5]

As discussed *supra*, appellants are requesting extensive relief from the present impact of past intentional discrimination and illegal testing and educational requirements utilized by the company-defendant from December, 1964 until March 25, 1971, relief from certain present discriminatory practices, and relief from the inadequate remedy granted by the district court desegregating the employee management boards. The district court denied their requests. We reverse in part, affirm in part, and remand.[6]

I. COMPANY ORGANIZATION AND EMPLOYMENT PRACTICES

A. *Company Organization*

1. *Departments.* The company's operations are organized into various departments. There are five primary production departments, each having separate and distinct functions from the other. They consist of: (1) the mono-cast department containing three pipe shops for the production of cast iron and ductile iron pipe; (2) the fittings foundry which produces between 35,000 to 40,000 different accessories to complement the

[4]In their original complaint, plaintiffs had filed their class action pursuant to Rule 23(b)(3). Under an order of the district court requiring that the class alleged be defined clearly and particularly, the plaintiffs amended their complaint to allege a Rule 23(b)(2) class action and presented a list of names of the members of the class, to the best of their knowledge, to the district court.

[5]From this statement from plaintiffs' amended complaint defining the class represented, it is clear that we are *not* concerned with discriminatory *hiring* procedures and their remedy.

[6]Our holdings and the relief directed are granted both under Title VII and section 1981 unless otherwise stated.

pipe produced in the pipe shops; (3) the steel foundry which produces steel tubes and castings of various alloys and shapes; (4) the melting department which melts all of the hot metal required by the mono-cast department, the fittings foundry, and the steel foundry; (5) the steel pipe foundry which produces steel pipe from steel skelp. In addition, there is a machine shop which performs all the labor required on items produced in the steel foundry, the fittings foundry, and the mono-cast department, as well as replacement maintenance on all machinery. Four of these departments—all except the steel pipe foundry and the machine shop—have employed the majority of black employees within the company between 1963 and 1971.

The company also has service departments consisting of the general yards department, central stores, the shipping department, electrical department, maintenance department, inspection department, and the construction department. These departments perform services in the receipt of raw materials, the shipment of finished products, and various maintenance functions in the company's operations. Of these departments, the general yards, shipping, and construction departments have had substantial numbers of black employees.[7] The machine, electrical, maintenance, and inspection departments consist principally of the higher skilled jobs and craft positions with a small turnover in personnel. Fewer blacks have been employed in these departments.[8]

2. *Wage progression and advancement.* The method of advancement within these departments is a wage progression schedule, a ladder of pay groups, embracing one or more jobs. The company alleges that these are job-to-job sequences with functional relationship. The appellants argue that the company admitted that no formal, functional lines of job progressions have ever been maintained. Until 1968 the company maintained twenty-three pay groups, but on February 19, 1968, the structure was consolidated into fifteen pay groups: (a) groups 1-8 include the unskilled and semi-skilled functions;

[7]See chart B *infra*.
[8]See chart B *infra*.

(b) groups 9 and 10 contain the more semi-skilled positions; (c) group 11 is the skilled non-craft, technical and clerical positions; (d) groups 12 and 13 are the skilled craft and technical jobs; (e) group 14 includes the secondary supervisory, and group 15, the primary supervisory positions (leadmen and foremen). The district court found that "the overwhelming majority of the black employees historically were and continue to be employed in the *pay groups 1-8 jobs* in the various departments and particularly in the mono-cast 1, 2, and 3, and foundry." (Emphasis added).[9]

B. *Employment Practices*

1. *Intentional discrimination.* Until 1961 the company formally maintained exclusively black jobs and exclusively white jobs.[10] Departments were not totally segregated, but there were predominantly black and predominantly white departments. When Presidential Executive Order No. 10925 made such a policy unlawful in 1961, the company terminated this practice. The resulting employment segregated profile, however, was preserved until 1963 by economic conditions requiring lay-offs and subsequent rehiring of laid-off workers. The process of lay-off and rehiring meant that any movement of black employees into traditional white jobs would come to

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[9]Plaintiffs' exhibit 6, "total number of employees by race within each pay group as of August 15, 1971" (two months before trial), indicates pay group stratification along racial lines. Over 95% of the company's black employees work in pay groups 1-8 jobs, while only 30% of white employees hold these positions. See chart C *infra*.

[10]Discrimination prior to the effective date of Title VII, July 2, 1965, can be considered under two theories. Since the appellant's allegations are also made under 42 U.S.C.A. § 1981, employment practices prior to 1965 may be examined. Secondly, this court specifically explained in United States v. Jacksonville Terminal, 451 F.2d 418, 441 (5th Cir. 1971), cert. denied, 406 U.S. 906, 92 S. Ct. 1607, 31 L.Ed.2d 815 (1972), and affirmed in Burns v. Thiokol Chemical Corp., 483 F.2d 300 (5th Cir. 1973), that pre-act discriminatory conduct is highly relevant, especially, when considering neutral practices under Title VII alleged to carry forward past discriminatory effects. *See* United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970).

an end. As lay-offs occurred, the employees with the least *departmental* seniority, *e. g.* the newly hired, promoted, or transferred black employees, would be either (1) furloughed, if newly hired, or (2) dropped back into the department from which they transferred, as they retained former departmental seniority in that department for lay-off purposes.[11] As production increased in 1964, and re-employment of blacks might normally be expected to increase, the company instituted its illegal testing and educational requirements. As of 1963 black employees constituted about half the work force of the company, but only three blacks earned more than any white production workers, and few if any jobs had racially mixed staffing.

2. *Hiring.* Sometime prior to 1960, the company had instituted a hiring requirement of a high school education or its equivalent for all white applicants. By 1960 white applicants were also required to pass a screening test battery and a physical examination. Black applicants employed prior to 1964 were only required to pass the physical examination. In 1964, after a compliance review under Order No. 10925 by the Department of Army and Office of Federal Contract Compliance, the company was informed that to be eligible for federal contracts it could no longer maintain different standards for hiring black and white applicants. The company at that time extended the testing and education criteria to black applicants. These standards for *hiring* remained in effect until 1971. However, the company eliminated test requirements as well as the criterion of a high school education or its equivalent for hiring into pay groups 1-8 on July 14, 1969.[12] The failure of blacks successfully to hurdle these qualifying barriers had resulted, between 1965 and 1969, in the decrease in the number of black employees in

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[11]We note that in Rowe v. G. M. C., 457 F.2d 348, 357-358 (5th Cir. 1972), this court rejected this as an ameliorating variable justifying a seniority system which, during the "ebb and flow" of lay-offs and rehiring, required black employees to once again "go to the foot of the line."

[12]The company thought it would be in a better position, as a participant in the national program, to employ persons among the hard core unemployed.

the plant from 869 to 791, while the number of white employees increased from 923 to 2,162.[13]

3. *Promotion and transfer.* In December, 1964, the company initiated a testing requirement for promotion within or between any pay groups and for *transfer* between departments.[14] Achievement levels (test cut-off scores) were established using the California Survey of Mental Maturity Tests. To be eligible for position in a particular pay group, an employee had to obtain a test score corresponding to the specified achievement level. The company determined that the tests' recommended national norms were too high for the company's purposes. Therefore, the company in an effort to establish its own standards of norm selected 100 average performers from its employees to take the test. This was used to determine what achievement levels to assign to various jobs within the company's pay grades. Ninety-eight of the 100 selected employees took the test. Seventy-five were black; and twenty-three were white. This testing program for promotion was reviewed by Dr. Brimm of the Department of Army and Office of Federal Contracts Compliance and praised as one of the best systems in the companies he had visited on compliance reviews.

On February 19, 1968, the company eliminated the testing criterion for promotion within the first eight pay grades.[15] In addition to employee complaints concerning these testing requirements, the company determined that ability of employees to perform functions in these pay grades could be established by on-the-job observation without detriment to the company. Requisite achievement levels for hiring and for promotion or transfer within or without a department to positions in pay

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[13]The black/white ratio went from just under 50/50 to about 25/75.

[14]The testing program for promotion was carefully explained to all employees. It was solely voluntary. And employees were allowed to retake the test every twelve months to attempt to improve their achievement level. In addition to the testing, departmental seniority was a factor in determining promotion.

[15]The company, however, continued to require testing for *new hirees* in pay groups 1-8 until July 14, 1969, as well as the requirement of the high school educational or its equivalent.

groups 9-15 were retained, however. The company eliminated all testing in March, 1971. Currently, the company simply tries the person, selected under the bidding procedure on the basis of departmental seniority or plant seniority and ability, on the job and evaluates his performance in determining the promotion.

4. *Testing and educational requirements.* A testing prerequisite was required for hiring, promotion and transfer, and entry into the apprentice and on-the-job training programs. A high school education or its equivalent was a criterion, as well, for being hired or entry into the apprentice program.

Concerning the testing conducted by the company, the district court concluded:

> The history of the testing, as they existed and were administered by defendant from July 2, 1965,[16] to March 25, 1971, recorded in the findings of fact, *supra*, is convincing that they were not discriminatorily applied to defendant black employees. *Their adverse impact on the employment opportunities of blacks is equally clear.* Judged by the standard established by Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), they could not pass muster. (Emphasis added).[17]

The Supreme Court in facing a high school education and testing requirement in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), stated:

> . . . The Act [Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

[16]We note that although the district court specifies July 2, 1965, it also stated that the testing for promotion purposes began in December, 1964. Discriminatory employment practices prior to the effective date of Title VII, July 2, 1965, are relevant in determining allegedly present effect from past discrimination. See note 10, *supra* at 7.

[17]It is unclear whether the district court meant both the testing and educational requirements or just the testing. The EEOC guidelines define testing to *include* an educational requirement. 29 C.F.R. § 1607.2.

> On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability.
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>
> . . . [B]ut good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.
>
> The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question. 401 U.S. at 431-432.

The appellees do not challenge the district court's conclusions under *Griggs* concerning their testing. We affirm and will discuss more fully the grounds supporting the court's decision. The testimony both by appellants' witnesses and the company's witnesses indicated that the testing and educational requirements had resulted in fewer black employees being employed between 1965 and 1969 and fewer black employees being promoted between 1965 and 1971. The statistics from these periods depict the same *prima facie* pattern, and support the district court's conclusion of adverse effect.[18] This disproportionate impact on black applicants and employees shifts the burden of demonstrating job-relatedness to the company under *Griggs*.

The company made no attempt to validate any of the num-

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[18]We discuss extensively the testimony and the statistics *infra*. Charts A, B, C, D, and E, *infra* should be examined.

ber of tests utilized,[19] except the California Test of Mental Maturity. The trial court found this showing inadequate under *Griggs*. We concur.

In United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973), this Court passed specifically on the proper validation procedure for employment tests. Although recognizing that "a test is not valid or invalid *per se*, but must be evaluated in the setting in which it is used" (*Id.* at 912), we note that the company has at no time attempted to validate its tests under the EEOC guidelines, 29 C.F.R. 1607, CCH Employment Practices ¶ 4010, which we found mandatory in *Georgia Power*.[20] The company's efforts to establish achievement levels which have a relationship to job performance are less acceptable than the procedure held inadequate in *Georgia Power*.[21] *Id.* at 912-918.

Although it is unclear whether the district court ruled on the high school education standard for *hiring* purposes,[22] we

[19]For promotion and transfer purposes, beginning in 1964, the district court found that the company utilized the California Test of Mental Maturity. The record indicates that this test or a shortened excerpt from it was also used as one of the primary determinants for hiring and entry into the apprentice and on-the-job training programs. An aptitude test was additionally required for a craft rate (pay groups 12 and 13) or equivalent job, *e. g.* apprentice and on-the-job training programs.

[20]This Court stated:

"This requirement to treat the guidelines as expressing Congressional intent obviously was intended as an answer to the question at issue in *Griggs*—When can tests, which are shown to have discriminatory results, be used? . . . Nevertheless, these guidelines undeniably provide a valid framework for determining whether a validation study manifests that a particular test predicts reasonable job suitability. Their guidance value is such that we hold they should be followed absent a showing that some cogent reason exists for noncompliance." 474 F.2d at 913.

[21]We recognize that the validation procedure of the California Test of Mental Maturity set forth at trial by the company was conducted in 1964, before the *Griggs* or the *Georgia Power* decisions. However, the company asserted at trial that this procedure and the approval of Dr. Brimm of the Office of Federal Contract Compliance satisfied the legal standard for employment testing. Since *Griggs* and *Georgia Power* are the legal standards, we cannot agree that they have been met.

[22]Since the high school education, or its equivalent, criterion for entry into the apprentice program is an open issue on this appeal, we will postpone analysis until II (B) (1) and III (A).

think that this educational requirement cannot "pass muster" under *Griggs*, either.[23] Johnson v. Goodyear Tire & Rubber Co., 5 Cir. 491 F.2d 1364 [No. 73-1712 March 27, 1974]; United States v. Georgia Power Company, 474 F.2d at 918-919; United States v. Consolidated Copper Co., 6 EPD ¶ 8918 (D. Ariz. 1973).

Given the adverse effect, the company had the burden of showing *job relatedness*. As we stated in *Georgia Power*:

> There [in *Griggs*], the court explicitly held that the use of a high school requirement which has a disproportionate racial impact and has not been proven to be a predictor of ultimate job success controverts the congressional mandate of Title VII.[14] As with Georgia Power's testing program, *supra*, the issue here is whether or not the company has made a sufficient showing to manifest a relationship between its educational requirement and its job characteristics. 474 F.2d at 918.[24]

The company offered *no evidence* to satisfy this burden.

Lastly, we wish to point out here, as was true also in *Georgia Power*,[25] a large percentage of the current employees (August 12, 1971), 56% of the black employees and 12% of the white employees, are enjoying job success without a high school diploma.[26] *See* Griggs v. Duke Power Co., 401 U.S. at 431-432.

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[23]The Supreme Court in *Griggs* stated:

"History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality." 401 U.S. at 433.

[24]In note 14, the Court pointed out that such an educational requirement, also, ran afoul of the Equal Employment Opportunity Commission's guidelines. The EEOC defines "testing" to include an educational criterion and requires similar validation. 29 C.F.R. §§ 1607.2, 1607.4.

[25]474 F.2d at 918-919.

[26]For example, there are seventy-five white employees who without completion of a high school education make over $4.00 an hour. As chart E *infra*, indicates, $4.00 an hour is well above the average pay rate in most departments.

The company ended its formal policy of segregation of black and white jobs in 1961, although its immediate effect lingered until 1963. The improper testing for hiring, promotion and transfer, and admittance into the apprentice and on-the-job training programs, as well as the educational criterion for hiring were terminated on March 31, 1971. We have affirmed the district court's holding that the testing, and ourselves have found that the educational criterion, fail under the standards of *Griggs*. We agree with the district court that these discriminatory practices had an "adverse impact on the employment opportunities of blacks." The issues are now threefold: (1) Did the district court err in denying an injunction against the future imposition of testing and educational standards? (2) If there is present effect in the company's neutral employment practices as a result of the past discrimination, what relief is required? and (3) Are there continuing, present discriminatory practices?

II. PRESENT ADVERSE EFFECT AND PRESENT DISCRIMINATION

Appellants assert that the consequence of the past intentional exclusion and of the illegal testing and educational standards is currently carried forward by: (1) the neutral practices of the departmental seniority and the bidding and posting procedure which determine promotion; (2) the age requirement for entry into the apprentice program, which black employees who were denied this opportunity in the past cannot now meet; and (3) the departmental bidding utilized for the selection of on-the-job trainees. In addition, the continued educational prerequisite for entry into the apprentice program and the purely subjective criteria to be applied by all-white department superintendents for selection of supervisory personnel are challenged as present discriminatory practices.

A. *Promotion—The Seniority System and Posting and Bidding Procedure*

1. *Effect of present neutral practices.* Beginning January 1, 1971, the company instituted a policy of posting vacancies above pay group 3 and adopted a bidding procedure for filling these vacancies.[27] The job vacancies are first posted for bidding for three days *within the department.* Basic qualifications, i.e. ability, and *departmental* seniority control the selection from the bidders. If no qualified employee within the department bids, then the company posts the vacancy plant-wide. A transferring employee retains his former seniority for purposes of returning to his former department in case of lay-off within the new department. But he does not carry over any of his accumulated seniority for purposes of departmental promotion – a basic unit or job seniority type.[28] *See* Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv. L. Rev. 1260, 1263-66 (1967).

Because of the company's wage progression structure, a transferring employee may move from a higher to a lower paying position.[29] In fact, an employee who has progressed substantially within pay groups in one department and then transfers to a different department to enhance his chances for eventual advancement, higher pay, or better working conditions will usually be required to endure a loss of seniority and a wage cut as a condition of transfer.

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[27]Before 1971 the company did not have a systematic written procedure for filing vacancies. Promotions within a department went to the senior department employee in the pay group at the immediately lower level. Departmental superintendents, who were all white, determined which employee got the promotion. Evidently, the company discouraged transfers between different departments. Promotions within a department and transfers to pay group 9 or above, of course, were still subject to the testing standards until March 25, 1971.

[28]The district court stated that a tranferring employee is given one year's credit for wage progression purposes, and, also, permitted credit for any training or past experience for a job within the higher pay group which he has now obtained.

[29]*See* note 30, *infra* at 223.

Appellants assert that invidious discrimination prior to 1963, and the illegal testing and educational requirements from 1964 through 1971, have resulted in racial stratification between departments and jobs within departments (and consequently in salary). This stratification is a manifestation of these past practices which have (1) excluded the majority of black workers from positions in predominantly white departments thereby absolutely preventing their obtaining of seniority there; and (2) if not excluded, deferred initial entry into these departments, thereby curtailing the seniority of black employees in these departments and hampering their promotion to higher paying positions. Therefore, appellants' argument is that this stratification of black employees into the lower paying departments and jobs, caused by *past* discriminatory practices, is *presently* effectuated through the departmental seniority system and bidding and posting procedure.

The departmental seniority system has this locking-in effect because the black transferee would have to forfeit seniority and pay rate[30] in order to transfer and because the black transferee to a predominantly white department would be unable to compete equally for promotion based on departmental seniority with a white employee, in the department at the time of the transfer, of equal or less *plant* seniority. Black employees within predominantly white departments, who were unable to gain entry into the department prior to 1971, because of their race, as swiftly as white workers, would also be harmed in greater proportion by lay-offs or reductions in force.[31]

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[30]For purposes of wage rate progression *only*, a transferee is allowed one year's credit. For promotion, lay-offs, or reductions in force, a transferee is treated within the department as a "new man."

The retention of one year's credit for pay group purposes does not reduce substantially the deterrence to transfer of this class of black employees because their employment with the company extends over a long period of time. For example, a list of 623 class members was submitted to the district court in 1969. Even then, *four years ago*, these employees had substantial plant-wide seniority. Further, every employee has to serve a six month probation period before being eligible for a promotion.

[31]The court in United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971), aptly described these hurts:

Under the bidding and posting procedure, only if no qualified employee *within* a department bids after three days is a vacancy posted plant-wide. This process continues to freeze in the stratification in two ways. First, those black employees previously excluded from the higher paying departments because of their race will be denied these promotion opportunities in favor of those white employees *in the department*. Secondly, those black workers, who, although deterred because of their race, have obtained a foothold in a predominantly white department cannot compete equally on the basis of departmental seniority with white employees, who were able to gain entrance to the department earlier.

Therefore, conclude appellants, the departmental seniority system deters black employees from transferring because of the inhibitors of losing seniority and pay grade while the bidding and posting procedure most often prevents even the consideration of the majority of black workers for a position within a predominantly white department. And both practices operate to handicap black employees in intra-departmental promotion

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"In order to transfer to a formerly 'white' department these employees were required to suffer an economic penalty, forfeiture of seniority rights and pay levels earned in the 'black' department. The former was due to the use of departmental seniority, the latter to the fact that the transferee's new job was at a low paid entry level in the new department. Thus, to obtain an opportunity that had been denied them because of race, these employees had to be willing to give up what was already theirs because of service in the plant. Second, a transferee to a 'white' department would never be able to reach the level of a white employee already there. For example, if a black and a white employee had been hired at the same time and the latter had been assigned to the more desirable 'white' department, but the black had not been so assigned, the white started to accumulate department or unit seniority in that department but the black did not. Even if the black was given the chance years later to transfer into the 'white' department, the earlier discriminatory job assignment had denied him the chance to earn seniority up to that time in the 'white' department. Therefore, the use of departmental or unit seniority for purposes of promotion in the formerly 'white' department continued the effect of the earlier discriminatory practice." *Id.* at 658.

See United States v. N. L. Industries, Inc., 479 F.2d 354, 358-366 (8th Cir. 1973); United States v. Jacksonville Terminal Co., *supra*, 451 F.2d at 453.

for the higher paying, skilled jobs.[32] We agree with appellants that if past discriminatory employment practices have resulted in racial stratification in pay, jobs, and departments, the present effect is to lock in, as discussed above, black employees.[33]

2. *Effect of past discriminatory practices.* The next step is to determine whether there was racial segregation along pay, job, and department lines. While there was substantial *viva voce* evidence on the issue of the impact of past discriminatory practices, the appellants primarily relied on statistical evidence. Introducing black/white comparative employment statistics from 1963, 1965, 1969, and 1971, dealing with salary, jobs, and departments, the appellants demonstrated a pattern of racial stratification between departments and within departments by the derogation of black employees into the lower paying, non-skilled pay groups. This statistical pattern considered in light of the past intentional discrimination and the illegal testing requirement, coupled with the hurdles to black employees presented by the departmental seniority system and the handicaps under the bidding procedure, present a *prima facie* case of present effect of past discrimination in the company's promotion and transfer process.[34] *Cf.* McDonnell Douglas Corp. v. Green,

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[32]A unit seniority system, by its nature, allows the most advantages to employees with the greatest unit seniority. *See* Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598, 1603 (1969).

[33]Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d 1364; Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); Head v. Timken Roller Bearing Co., 486 F.2d 870, 875-876, n. 7 (6th Cir. 1973); United States v. N. L. Industries, Inc., *supra*, 479 F.2d at 358-366; United States v. Georgia Power Co., *supra*, 474 F.2d 906, 926-927; United States v. Jacksonville Terminal Co., *supra*, 451 F.2d 418; Long v. Georgia Kraft Co., 450 F.2d 557 (5th Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791, 795-800 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969); Stamps v. Detroit Edison Co., 365 F.Supp. 87 (E.D.Mich.1973); United States v. Virginia Electric and Power Company, 327 F.Supp. 1034 (E.D.Va.1971); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D.Va.1968).

[34]Statistical evidence in Title VII cases has often been given critical weight in this Circuit, Johnson v. Goodyear Tire & Rubber Co., *supra*,

411 U.S. 792, 800-807, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In relying on this method of statistical proof, we first examine the total black white employment figures for the years 1963,

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491 F.2d at 1371-1373; Ochoa v. Monsanto Co., 335 F.Supp 53 (S.D.Tex. 1971), aff'd per curiam, 473 F.2d 518, 519 (5th Cir. 1973) ("Accord statistical evidence great and oft-times decisive weight"); Rowe v. General Motors Corporation, *supra*, 457 F.2d at 356-358 (statistics have "critical, if not decisive, significance—certainly at least in putting on the employer" the burden of justifying the disparity); United States v. Hayes International Corp., 456 F.2d 112, 120 (5th Cir. 1972) ("these lopsided ratios are not conclusive proof of past or present discriminatory hiring practices; however, they do present a *prima facie* case."); United States v. Jacksonville Terminal Co., *supra*, 451 F.2d at 424-436, 441-442 (5th Cir. 1971) ("although the statistics do not establish a *prima facie* case of discrimination, . . . absent explanatory evidence in testimony, the statistics indicated that officials have impliedly equated job qualifications with race."); United States v. Hayes International Corp., 415 F.2d 1038, 1043 (5th Cir. 1969) ("the employment statistics discussed, *supra*, . . . amply demonstrated a preliminary showing that the company's hiring practice violated Title VII."). Other circuits agree. Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382 (4th Cir. 1972), cert. denied, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972); United States v. Ironworkers Local 86, 443 F.2d 544, 550 (9th Cir.), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971); United States v. National Lead Co., 438 F.2d 935 (8th Cir. 1971); Parham v. Southwestern Bell Telephone Co. 433 F.2d 421, 426 (8th Cir. 1970); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir. 1970), cert. denied, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971). *But see*, Heard v. Mueller Co., 464 F.2d 190 (6 Cir. 1972); Russell v. American Tobacco Co., 374 F.Supp. 286, 5 EPD ¶ 8447 (M.D.N.C.1973). *See generally*, Fiss, A Theory of Fair Employment Laws, 38 U.Chi.L.Rev. 235, 268-81 (1971).

The courts have most often utilized this empirical proof in discriminatory hiring situations. The courts have based a finding of adverse impact on data showing the percentages of blacks and whites hired as compared to the percentages of each in the available population. The statistical disparity is held to create a *prima facie* showing of discriminatory impact and thus invokes a requirement that the job relatedness of the overall selection process be established. *E. g.*, United States v. Hayes International Corp., *supra*, 456 F.2d at 120; United States v. Ironworkers Local 86, *supra*. Some courts have gone a statistical step further. The Eighth Circuit in *Parham*, *supra*, ruled that a gross disparity between the number of minority workers in an employer's work force (less than 2%), and the number in the overall population (21% of the state population) can prove discrimination *"per se."* *See* Rios v. Enterprise Association Steamfitters, Local 638, 326 F.Supp. 198 (S.D.N.Y.1971).

1965 through 1971. Between 1965 and 1969, the period when the testing and educational requirements were prerequisites for all pay groups, the number of black workers decreased from approximately one-half to one-third of the company's work force, correspondingly the number of white employees increased. The company admitted and the district court[35] found that this decrease resulted from the impact of the testing and

Chart A: Employment Totals by Race

YEAR	BLACK	WHITE
1963	878	797
1965	869	923
1966	845	1606
1967	820	1766
1968	798	1878
1969	781	2162
1970	1121	2115
1971	927	1624

educational requirements.[36] It was not until 1969-70, when the company dropped its testing and educational requirements for jobs in the 1-8 pay groups, that the percentage of black employees for the company began to increase. By 1970, 1971 the company's work force again was approximately 50% black.

Testimony by company officials and a finding by the district court establish what the empirical proof clearly reveals, a substantial disparity in the number of blacks hired between 1964 and 1969 when testing and educational standards were required for all pay grades. Since the same test, California Test of Men-

[35]The district court stated:

"During the 1964-69 period, when all applicants were subject to the educational and testing standards, more whites than blacks were employed because a greater percentage of black applicants were unable to meet these requirements."

[36]There was no allegation that this resulted from fewer black applicants. We take judicial notice of the substantial black population of Jefferson County, Alabama and Birmingham, Alabama from whence the company draws most of its work force.

tal Maturity, was employed both in the determination for hiring and for promotion, its adverse impact on black applicants is highly relevant in weighing its adverse impact on the promotional opportunities of black employees.

Hiring statistics indicate that black applicants fared substantially worse than white applicants on the testing. So too the actual achievement of black workers on the mental maturity test reveal lower scoring than white employees of the company as of September, 1971. For example, in the five departments[37]

Chart B: Employees By Department And Race

	1/1/63		1/27/65		9/19/69		8/15/71	
Department	B	W	B	W	B	W	B	W
Mono-Cast	359	104	311	138	343	338	369	310
Fittings Foundry	234	185	242	234	222	344	245	296
Melting	60	26	67	70	74	107	77	108
Maintenance	9	67	9	74	6	87	9	90
Technical Division	6	25	6	51	6	60	—	—
Bolt Department	30	21	24	13	27	33	29	37
Shipping Department	35	21	40	19	22	31	30	34
General Yards	15	12	14	13	17	18	19	20
Construction	20	25	19	33	26	42	27	56
Steel Foundry	35	28	34	65	32	58	36	51
Plant Protection	0	13	0	13	1	15	—	—
Engineering	0	2	0	3	0	2	0	2
Finance Division	4	16	4	6	3	5	3	4
Personnel	19	2	20	2	19	7	13	23
Storage	0	5	0	6	1	17	2	21
Medical							5	0
Research							2	6
Lab							4	9
Shopping Center	2	4	1	3	0	1	—	—
Machine Shop	39	201	—	—	38	318	49	379
Electrical	1	41	1	47	1	54	4	73
Inspection							1	34
Steel Pipe			2	41	1	69	1	35
Production Control							0	8
Purchasing							0	2

[37]These departments were mono-cast (370 black, 314 white), foundry (245 black, 304 white), melting (77 black, 112 white), machine shop (50 black, 380 white), steel foundry (36 black, 55 white).

Chart C: Employees By Race Within Each Pay Group as of August 15, 1971

Pay Group	No. of Blacks	% of Blacks	% of Total In Plant	No. of Whites	% of Whites	% of Total In Plant
1	34	(3.68)	(1.35)	134	(8.42)	(5.33)
2	36	(3.89)	(1.43)	22	(1.37)	(.875)
3	336	(36.31)	(13.36)	185	(11.64)	(7.36)
4	122	(13.19)	(4.85)	44	(2.76)	(1.75)
5	84	(9.09)	(3.34)	26	(1.63)	(1.03)
6	125	(13.51)	(4.96)	55	(3.46)	(2.19)
7	110	(11.89)	(4.37)	55	(3.46)	(2.19)
8	35	(3.79)	(1.39)	52	(3.27)	(2.07)
9	23	(2.49)	(.904)	278	(17.49)	(11.06)
10	2	(.216)	(.079)	49	(3.07)	(1.95)
11	9	(.971)	(.358)	104	(6.67)	(4.13)
12	7	(.757)	(.278)	436	(28.43)	(17.38)
13	0			24	(1.51)	(.959)
14	0			60	(3.77)	(2.39)
15	0			61	(3.81)	(2.42)
16	0			1		(.039)
17 (other)	2	(.216)	(.079)	3	(.186)	
TOTAL	925			1,589		

containing 80% of the black workers, the black employees' scores averaged in the 0-9, 10-19, or 20-29 percentile while white employees' scores averaged in either the 40-49 or 50-100 percentile in *every* department.

Having observed that black employees performed less well on the tests than white employees, we must make a comparison of the black/white employment data by departments and within departments by pay rate to discover if the impact of the illegal testing (scoring lower) was to lock black workers into lower paying, non-skill departments and lower paying jobs in all departments. The statistics from 1963 to 1965 indicate almost complete stratification of black employees within the non-craft departments, mono-cast, fittings foundry melting, bolt, shipping, steel foundry, and general yards, and white employees in the more craft oriented, highly skilled departments, maintenance, machine shop, electrical, inspection, and steel pipe.

Within departments, black employees occupied predominantly the 1-8 pay groups and white employees the 9-15 pay groups.[38]

Between 1965 and 1969, the data indicates less black/white stratification, but the district court found that this was *not* due to advancement by black into previously predominant white employee positions. Rather, as the total black/white hiring figures indicated, the increased hiring of whites and decrease in the number of blacks led to the placement of whites into the previous lower paying, predominantly black departments and positions. The district court further pointed out that the black employees during this period could not qualify under the testing for transfer or promotion.

Between 1969 and 1971, the statistics demonstrate a rise in the number of black employees in the pay groups 1-8. It was in February, 1968 that the testing requirement for positions in these pay ranges was removed; and in March, 1971 testing for all purposes was halted by the company.

These statistical showings are corroborated by the testimony of Mr. Phelps, the Employment Manager and Administrator of the tests, who stated:[39]

Q. I said are you familiar with the fact that in taking the tests blacks score less favorably than whites?

A. Yes.

Q. In all departments, is that correct?

A. I can't answer that positively.

Q. What is your best judgment?

A. Yes.

This historical, statistical summary indicates a discriminatory pattern against black employees – (1) assignment to lower paying non-skill departments and (2) assignment to lower paying jobs within all departments. As of August 15, 1971 the traditional predominantly black departments, monocast, fittings

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[38]See the district court's findings *infra* at 227.

[39]Every other company official who testified, the Vice-President and Works Manager and the Superintendents of the Pipe Foundry, Machine Shop, and Steel Foundry, agreed that black employees scored less well than white employees.

foundry, melting, bolt, shipping, steel foundry, and general yards, contained approximately 81% of the black workers of the company.[40] The higher paying, traditionally white departments, maintenance, machine shop, electrical, inspection, and steel pipe, contained only 7% of the black employees although 37.6% of the total white work force was employed in these departments.

While the extreme stratification by *pay rate* along racial lines of 1963[41] was blurred by the influx of large number of white employees into the traditionally lower paying black positions from 1965 to 1969, there was no sign of movement of blacks into higher paying jobs.[42] The district court's findings reflect this fact. The district court examined eight key departments to demonstrate that job types were segregated with blacks occupying the lower paying positions. The court concluded:

> The number of all black jobs decreased through 1969 as the number of mixed jobs increased due to the movement of whites into lower paying black jobs. From 1963 through 1969, the number of all white jobs remained approximate-

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[40]In 1963 when racial stratification was present because of the formal discriminatory policy of the company prior to 1961, these departments also contained 81% of the company's black employees. While this can be somewhat explained by the newly hired blacks between 1969 and 1971, this does not explain the absence of blacks from the higher paying departments and higher paying jobs.

[41]In 1963, jobs in all departments were segregated on a racial basis with whites holding only the higher paying jobs and blacks holding only the lower paying jobs. For example, in the mono-cast department, where 359 of 869 black employees work, no black employee earned over $2.65 per hour, while no white employee earned less than $2.65 per hour. In the fittings foundry, only three of the 234 blacks earned above $2.31 per hour while the lowest rate paid to any of the 185 white employees was $2.65 per hour. In the machine shop, every white employee (201 total) earned at least $.41 more than the highest of the thirty-nine blacks. The other departments reflected the same pattern.

[42]The comparative earnings charts submitted by appellee to contradict appellants' empirical assertions that black employees were derogated to the lower pay groups suffers from this variable. The newly hired white employees during this period were placed into the lower paying previously black jobs. Since they received low annual salaries, the greater earnings of white employees than black employees of *comparable seniority* was masked.

ly constant. Promotion of blacks to the higher paying white jobs, for reasons suggested above [testing and educational requirements], was not being accomplished.

The chart drawn up by the court reflects that in 1963 not a single type of job in any of the eight key departments was held by *both* white and black employees; 213 positions were totally segregated. The data from 1969 indicates that there were fifty-

Chart D: Segregation By Types Of Jobs

Department	Year	# All B	# All W	# B/W	Total
Foundry	1963	38	34	0	72
	1965	37	30	6	73
	1969	18	29	21	68
	1971	19	24	22	65
Melting	1963	20	13	0	33
	1965	11	16	11	38
	1969	9	17	16	42
	1971	6	14	18	38
Steel Foundry	1963	18	19	0	37
	1965	14	22	4	40
	1969	9	23	11	43
	1971	9	20	12	41
Machine Shop	1963	5	19	0	24
	1965	–	–	–	–
	1969	5	11	4	20
	1971	5	26	4	36
Construction	1963	2	9	0	11
	1965	3	11	0	14
	1969	6	15	0	21
	1971	7	21	0	28
Shipping	1963	6	6	0	12
	1965	9	6	0	15
	1969	7	10	3	20
	1971	8	11	3	22
Personnel	1963	9	2	0	11
	1965	9	2	0	11
	1969	8	4	0	12
	1971	–	–	–	–
Technical	1963	4	0	0	13
	1965	3	10	0	13
	1969	3	3	0	6
	1971	1	1	0	2

Chart E: The Racial Distribution and Salary of Employees By Department As Of August 12, 1971*

		Blacks				Whites		
Department	Avg. Wage In Dept.	#	% B. In Dept.	Avg. Wage Of Blacks	Accumulating % Of Blacks In Work Force	#	Avg. Wage Of Whites	Accumulating % Of Whites In Work Force
Inspection	$3.83	1	2.9%	$2.78	0.1%	34	$3.86	2.1%
Maintenance	3.79	9	8.8	3.29	1.1	93	3.84	7.8
Machine Shop	3.65	50	11.7	3.08	6.5	379	3.72	31.1
Electrical	3.63	4	5.1	2.98	6.9	74	3.67	35.6
Steel Pipe	3.63	1	2.9	3.23	7.0	33	3.64	37.6
General Stores	3.57	2	8.7	3.38	7.2	21	3.59	38.9
Construction	3.43	27	31.8	3.01	10.1	58	3.63	42.5
General Yards	3.38	19	47.5	3.22	12.2	21	3.52	43.8
Shipping	3.36	30	46.9	3.06	15.5	34	3.63	45.9
Steel Foundry	3.32	36	39.6	3.16	19.4	55	3.43	49.3
Foundry	3.28	247	44.7	3.03	46.2	305	3.48	68.0
Melting	3.27	75	39.9	3.14	54.4	113	3.35	74.9
Monocast	3.16	371	54.2	3.08	94.7	314	3.26	94.2
Bolt	3.11	20	34.5	2.91	96.9	38	3.22	96.5
Personnel, Gen. Plant	3.04	15	38.1	2.95	98.4	25	3.09	97.9
Total		905				1595		

*All of ACIPCO's departments are included in this chart except those departments having less than 15 employees: Industrial Engineering, Production Control, Medical, Research, Laboratory, Purchasing, Finance and Engineering department. In total, 33 whites and 15 blacks are employed in these departments.

five racially mixed positions and 177 all white or all black positions. But the pertinent indicium for the period 1965-1969 is that the previous *all black* positions were being integrated by the influx of white personnel rather than any upward movement by black employees. In 1965 there were eighty-six all black jobs; in 1969 these were reduced to sixty jobs.[43] A total of thirty-four positions were integrated during this period. In other words, twenty-six of the thirty-four jobs were integrated by the movement of *white* employees or applicants into previously *all black* jobs. As late as 1971, only fifty-nine of 232 jobs were integrated – only 25% of the total.

The district court had earlier pointed out that black employees were placed into positions in the lower paid groups:

[43]The machine shop figures were eliminated from this computation because of the missing 1965 data.

> Although there were and continued to be blacks in substantially all the departments, the overwhelming majority of the black employees historically were and continued to be employed in the Pay Group 1-8 jobs in the various departments and particularly in the Mono-Cast 1, 2 and 3, Foundry.

This finding coupled with plaintiff's chart comparing the average wage of blacks and average wage of whites in all the departments firmly establish that black workers were forced into lower paying positions within the company. For example, just in terms of gross comparisons, 95.35% of the black employees and 36.03% of the white employees were in pay groups 1-8, while 63.94% of the white employees and only 4.65% of the black employees were in pay groups 9-16.

The district court, while agreeing that appellants' statistics revealed racial stratification, found that this resulted from factors other than past discriminatory employment practices.[44] The district court sifted out the following variables which were held to undermine appellants' empirical conclusions that black employees were locked in the lower paying jobs and departments:[45]

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[44]The district court stated:

"Understandably, plaintiffs rely heavily upon statistics to support an inference of invidious discrimination. But this is not a voter registration, jury selection, or school desegregation case. Thus the familiar platitude: 'In the problem of racial discrimination, statistics often tell much, and courts listen,' Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962), is not an unmitigated evidentiary windfall. In the area of employment, with its complexities and variables, statistics must be analyzed with careful attention both to supportive and opposing facts."

While we reject the district court's conclusion that statistics have a lesser role in employment discrimination cases than these other types of litigation (see note 34, *supra* at 225) we do agree that complexities and variables require close scrutiny of empirical proof. Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d 1364.

[45]Specifically in regard to the locking-in issue, the district court declared:

"Black employees cannot be heard to complain that they were locked in a particular job when they were not qualified to perform a job in a higher pay group. The record is replete with evidence of black employees who have refused promotions, requested demotions, declined training opportunities, and failed or refused to bid on higher paying jobs, thus voluntarily freezing themselves in the lower paying ones."

(1) Voluntary refusal of training opportunities which are prerequisite to promotion;
(2) Voluntary refusal of promotions;
(3) Lack of requisite qualifications;
(4) The failure to request promotions;
(5) Poor job performances which have defeated promotion or resulted in demotion;
(6) Voluntary transfers to lower job classifications;
(7) Availability or a lack of job vacancies; and
(8) Lack of motivation.

The variables suggested by the district court, when examined in light of our own and the appellants' critical analysis, do not, however, weigh heavily enough to lessen the appellants' empirical conclusions. The district court points to the refusal of 573 black employees to accept promotions from 1965 to 1971. But 554 black employees accepted offered promotions.[46] In addition, the testimony concerning the promotions offered indicated that these positions were often less desirable than the employee's current position, being more physically menial and paying little more with limited future advancement opportunities. Also, for employees who had substantial seniority, and had consequently reached the top of their pay groups, a promotion involving transfer to a higher paying department would result in a cut in pay and beginning as a new man in the department. *See* United States v. N. L. Industries, *supra*, 479 F. 2d at 362.

For the court to state that the black employees were unqualified is inconsistent with its conclusion that the testing was illegal under *Griggs*. For the testing and seniority were the *only* objective criterion utilized for promotion and transfer. Before January 1, 1971 (the date of the initiation of the posting and bidding procedure), the department superintendents utilized

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[46]During this period 854 white employees accepted promotions. There was no information breakdowns on how many refused promotions.

Without information on the percentage of white employees refusing promotions and the types of promotions offered white employees, we think the district court's statistic inconclusive.

their subjective judgment in determining which qualified (testing and departmental seniority) employees filled job vacancies. We note that these supervisory positions are held by all-white employees.

We considered this type of subjective evaluation in Rowe v. General Motors Corp., supra, 457 F.2d at 359, stating:

> All we do today is recognize that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks. . . . We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action.

A similar view to the trial court's was put forward by the district court in United States v. Jacksonville Terminal Co., *supra*, 451 F.2d 418, which had rejected the government's statistics because of their failure to evaluate competing black and white employees upon *individual* qualifications and accepted unadorned statements by the employer that they hired or promoted the *best qualified* persons available. We stated:

> The trial judge's pronouncement cannot function as a general rule. It becomes valid only when the employer or union evidentially demonstrates that objective criteria pertinent to the particular job are the determinants of who is "best qualified." *Id.* at 442.

The employee make up of the steel pipe department also belies this conclusion. It is the highest paying primary production department (mono-cast, foundry, steel foundry, melting, and steel pipe) but has very few black workers, one as compared to thirty-five white employees. (See chart B, *supra* at 227). Since there are only a few craft positions in this department, the logical conclusion is that black workers were excluded by discriminatory practices.

The court cites a lack of requests for promotions, and yet, until January 1, 1971 when the formal posting and bidding

procedure was initiated, there was no method by which black employees (or any employee) could request promotion.[47] During this period, promotion was, in effect, determined by all white supervisors; a practice we noted in *Rowe* which could have racial emphasis. This is particularly of importance considering the testimony reflecting a number of promotion requests by black employees which were never acted upon by the white foremen and department superintendents. Moreover, we deem appropriate the court's holding in United States v. N. L. Industries, Inc., *supra*, 479 F.2d 354:

> National Lead's contention that the reason black employees were not promoted to supervisory positions was because they did not "ask" to be promoted is without merit. Nothing in the record indicates that white employees were required to make such a request. In any case, a black employee with knowledge of the nominal number of black foremen, the Company's past discriminatory policies, and the current practice of promotion via the recommendation of an incumbent foreman could hardly be expected to make a meaningless request indicating his willingness to be promoted. Sheet Metal Workers [United States v. Sheet Metal Workers], *supra* [8 Cir.], 416 F.2d [123] at 132; *Carter, supra*, 452 F.2d at 331; *see Parham, supra*, 433 F.2d at 427. *Id.* at 369.

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[47]Courts have condemned procedures for promotion and job assignment which are not objective and uniform. *E. g.*, Brown v. Gaston County Dyeing Machine Corp., *supra*, 457 F.2d 1377; United States v. Dillon Supply Corp., 429 F.2d 800 (4th Cir. 1970).

In *Brown* the court stated:

"Here, in the absence of objective criteria applied to all workers alike, the statistics indicate that race is the only identifiable factor explaining the disparity between the jobs held by white employees and those held by black employees. . . .

"Moreover, the record discloses that notices of vacancies are not posted, and news of them is passed along by word of mouth. When job classifications are as segregated as they are in this company, delay in learning about a vacancy in an all white category may in itself discriminate against a black employee who hears of it only after it has been filled. This practice resembles the lack of a formal transfer system which we criticized in *Dillon*. 429 F.2d at 802, 804." 457 F.2d at 1383.

Further, there was testimony at trial by a department superintendent[48] that after the passage of the Civil Rights Act of 1964 (Title VII) the company received a "flood" of requests from black employees for more skilled positions. Of course, most were rebuffed by their failure to qualify under the illegal testing. In addition, during the first ten months in which the formal posting and bidding procedure operated, the testing and educational requirements having been terminated for the last six of these months, 41% (107) of the 251 jobs bid for departmentally and plant-wide were won by black employees.[49]

The single foundation for the district court's conclusion that black employees were performing poorly on the job is the figures that from July 5, 1965 through October 1, 1971, seventy-six black employees were demoted. But during the same period 143 white employees were demoted.[50] In addition, the testimony at trial indicates that demotions were often due to work cut backs rather than poor job performance.[51] This demotion statistic concerning black employees is at the least nebulous and at the most negative in support of the court's conclusion.

The only mention in the record of a voluntary transfer to a lower job classification was in reference to physical disabilities which required the employee to request a less physically wearing job. It was stated, however, that the company had a practice of allowing *older* employees, black and white, to accept

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[48]The superintendent of the mono-cast department gave this testimony. The mono-cast department is the largest of the company's departments with 651 employees. It has always contained the majority of black employees in the plant (currently 40.3%).

[49]There are no totals on how many of the 1,854 bidders were black employees.

[50]Black employees composed approximately just over one-third of the total employees of the company during this period.

[51]The superintendent of the melting department, 118 white employees and 101 black, stated that between July, 1965 and October 1, 1971, twenty-five white and twenty-nine black employees were demoted because of curtailment of operations. Under a departmental seniority system, the employees with the smallest amount of time would be laid off and the employee above him dropped down into his position. These twenty-nine were included in the total number of seventy-six blacks demoted.

Chart F: Class Enrollment By Race

	White Employees	Black Employees
1964*	116	134
1965	32	22
1966**	—	—
1967	134	12
1968	92	19
1969	109	10

* In 1964 the classes were conducted on a segregated basis.
**The district court did not provide statistics for 1966.

lower paying, less physically demanding positions without a reduction in pay rate.

As to the unavailability of job vacancies contention, the district court, itself, pointed out that between 1965 and 1970 employment at the company increased by 1,444 jobs, not including turnovers. Advancement opportunities were correspondingly increased during this period of rapid economic development.

The sole ground for the district court's conclusion of lack of motivation on the part of black workers appears to be lack of black enrollment in classes conducted by the company to aid in achieving higher scores in the testing.[52] But the statistics for these classes indicate that it was not until 1967 that black enrollment began to fall off. In light of the discriminatory impact of this illegal testing, it may be that blacks simply realized that the testing was stacked against them. This lack of motivation conclusion also comes in the face of the testimony by a company management employee concerning the "flood" of black applicants for more skilled jobs after the passage of Title VII. Fur-

[52]This conclusion by the district court also conflicts with a finding of initiative on the part of some black employees. The court stated, "Some black employees who failed to score well on the test exercised initiative to take further training with the defendant's assistance, and subsequently improved their test scores and advanced into higher paying jobs."

ther, the intense organization of black employees[53] and continued interest in this and past litigation[54] demonstrates that the black employees of the company are interested in opportunities for better pay and more highly skilled jobs.

In brief, the district court held that the statistical demonstration of the derogation of black employees to lower paying jobs and departments resulted from black employees' refusal of promotion and training opportunities, lack of qualifications, failure to request promotions, poor job performance, transfer to lower pay groups, lack of job vacancies, and lack of motivation. We find that this holding was "clearly erroneous." Humphrey v. Southwestern Portland Cement Co., 5 Cir. 488 F.2d 691 [1974]. Not only are these variable too numerally diminutive to rebut the distinct disparity in the black white employment data,[55] but analysis and the evidence have disclosed that these variables have no substantial validity.[56]

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[53]Many of the employees in the class of plaintiffs, here, are members of the Equal Employment Opportunity Committee. This was a committee formed by a majority of black employees of the company in 1965. And 718 charges from class members have been filed with the Equal Employment Opportunity Commission.

[54]This is the third time in five years that the plaintiffs have been before us.

[55]*Cf.* Ochoa v. Monsanto Company, *supra*, 473 F.2d at 320 ("But the smallness of the numbers demonstrates that the Court was not compelled to allow such statistical showing to set in train the usual presumptions or to make a finding of preference thereon.").

[56]In reviewing the trial court's determination, we are bound by the standard of Rule 52(a) of the Federal Rules of Civil Procedure: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Although Judge Learned Hand was correct in stating, "It is idle to try to define the meaning of the phrase 'clearly erroneous,'" (United States v. Aluminum Co., 148 F.2d 416, 433 (2d Cir. 1945)) this Court aptly phrased a workable formula in Chaney v. City of Galveston, 368 F.2d 774 (5th Cir. 1966):

> ". . . A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. . . . It is well settled that in order for a reviewing court to set aside findings of fact by a trial court sitting without a jury, it must be clearly demonstrated that such findings are without adequate evidentiary support in

3. *Conclusion concerning the promotion procedure.* The statistical picture drawn here is similar to that which this Court found persuasive in United States v. Jacksonville Terminal, *supra*, 451 F.2d 418. Under attack by the government there was a promotion system with a bidding procedure based on a rigid craft or class seniority similar to the bidding and departmental seniority systems at issue here.[57]

This Court stated:

> . . . [T]hey [statistics] do prove that employment at the facility is approximately equally divided between whites and blacks, that whites generally occupy the higher paying positions and that blacks hold the lower paying jobs. *Id.* at 441.

Similarly, the work force here is approximately 50% black with the black employees occupying the lower paying jobs and departments. Likewise, the jobs and departments here and in *Jacksonville Terminal* have been segregated both by prior formal discrimination and present effect.

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the record, or were induced by an erroneous view of the law, and the burden of showing that the findings are clearly erroneous is on the one attacking them." *Id.* at 776.

See United States v. United States Gypsum Co., 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948); Baggett v. Richardson, 473 F.2d 863, 865 (5th Cir. 1973); Hodgson v. American Bank of Commerce, 447 F.2d 416, 419 (5th Cir. 1971). *See generally*, 5A Moore's Federal Practice ¶ 52.03 [1] (2d Ed. 1969).

The findings reviewed here do not involve conclusions based on the credibility of witnesses giving conflicting testimony. Dillon v. M. S. Oriental Inventor, 426 F.2d 977 (5th Cir.), cert. denied, 400 U.S. 903, 91 S. Ct. 140, 27 L.Ed.2d 140 (1970). Rather at issue is the weight of evidence supporting the trial court's findings. We have determined that these findings are "without adequate evidentiary support" and therefore are "left with a definite and firm conviction" that the district court was mistaken.

[57]The Terminal maintained thirty-five seniority craft rosters. Within each roster jobs were broken down into classes which differed in pay and function. Ordinarily collective bargaining agreements precluded use of seniority acquired on one roster to bid for a job vacancy on another roster. In some cases, the same was true for interclass transfers. Vacancies were posted within the particular craft or class, and craft seniority primarily determined the winning bidder. *Id.* at 427.

> The statistics also show that almost all Terminal jobs were held exclusively either by whites or by blacks before July 2, 1965, and that this division has continued, with few exceptions, after that date. . . . Terminal records disclosed that the persistence of "black" and "white" jobs – whatever their formal denotation – has not been caused by failure to hire new personnel. . . . Moreover, as noted earlier, all blacks hired during this period, have become Porters. Promotions too have occurred. Blacks have gained a few supervisory positions in the Baggage and Mail Department and two Helper jobs in other departments. "In racial discrimination cases, statistics often demonstrate more than the testimony of many witnesses, and they should be given proper effect by the courts." Jones v. Lee Way Motor Freight, Inc., *supra*, 431 F.2d at 247; *accord*, Bing v. Roadway Express, Inc., 5 Cir. 1971, 444 F.2d 687 [1971]; Lea v. Cone Mills Corp., M.D.N.C. 1969, 301 F.Supp. 97, 102 *aff'd.*, 4 Cir. 1971, 438 F.2d 86. *Id.* at 442.

The district court there also rejected the statistical showing, finding that the employer had simply "hired or promoted the best qualified persons available for the particular jobs." This Court reversed.

> We cannot accept the assumption that the Government's statistics have no probative force: *i. e.*, "[t]he Government's failure or refusal to undertake a comparative evaluation of the entitlement to job vacancies of competing Negroes and whites, upon the basis of individual qualifications, leaves the record without probative evidence to support [the contention that black employees were not even considered for jobs to which whites were promoted or for which they were hired]." 316 F.Supp. at 581. The trial judge's pronouncement cannot function as a general rule. It becomes valid only when the employer or union evidentially demonstrates that objective criteria pertinent to the particular job or the determinants of who is "best qualified." *Id.* at 442.

This Court then went on to strike down the craft and seniority system because it restricted the "transfer and promotion opportunities of incumbent black employees." *Id.* at 453.

We have condemned similar promotion systems based on *job* seniority which operated to perpetuate past discrimination in Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d at 1373-1374; United States v. Georgia Power Co., *supra*, 474 F.2d 906; Long v. Georgia Kraft Co., *supra*, 450 F.2d 557; Local 189, United Papermakers & Paperworkers v. United States, *supra*, 416 F.2d 980. Likewise, other courts have found tainted departmental or job-type seniority systems, utilized for promotion purposes, which effectuated discrimination. United States v. N. L. Industries, Inc., *supra*, 479 F.2d at 358-360; United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Robinson v. Lorillard Corp., *supra*, 444 F.2d at 795-800; Griggs v. Duke Power Co., 420 F.2d 1225, 1236-1237 (4th Cir. 1970), rev'd on other grounds, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); United States v. Virginia Electric and Power Company, *supra*, 327 F.Supp. 1037; Clark v. American Marine Corp., 304 F.Supp. 603 (E.D. La. 1969).

The appellants have made a strong showing (1) that the company had a formal policy of discrimination prior to 1961 which lingered until 1963; (2) that the company maintained illegal testing and educational requirements from 1964 to 1971; and (3) that the employment statistics from 1963 until 1971 reflect that black employees have been derogated to the lower paying, non-skill departments and to the lower paying positions in all departments because of these past discriminatory employment practices. As we demonstrated above these variables cited by the trial court to explain the statistics, do not, on analysis, undermine the large statistical disparity between black/white employees' departments, positions, and pay rate. We have observed that the departmental seniority system deters black employees, by their loss of seniority and pay rate, from transferring and that the posting and bidding procedure, requiring initial consideration of persons within the department, often may prevent even the application of the majority of black employees for a job vacancy in the higher paying, predominantly white departments. In addition, both practices operate to handicap black employees in intradepartmental promotion because

past discrimination was an impediment to black employees acquisition of seniority in these departments. Therefore, the neutral practices of the departmental seniority system and the posting and bidding procedure carry forward into the present the stratification of black employees into lower paying, non-skill departments and jobs resulting from past discrimination. Neutral employment practices perpetuating past discrimination were condemned by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. at 430. Affirmative relief is mandated by our decisions in Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d at 1371, n. 34; United States v. Georgia Power Co., *supra*, 474 F.2d at 927; and Local 189, United Papermakers & Paperworkers v. United States, *supra*, 416 F.2d at 990-991.[58]

B. *Apprentice Program and On-The-Job Training*

The company provides its employees an opportunity to train for the highly skilled, higher paying craft jobs through an apprentice program or on-the-job training (journeymen). The company maintains these programs for the following crafts: mechanic, machinist, electrician, carpenter, molder, pattern maker, welder, scale mechanic, brick layer, plumber, and tinsmith. The departments in which most of the craft jobs are located are the machine shop, electrical department, construction department, and maintenance department.

1. *Apprenticeship.* Only incumbent employees are eligible

[58] "Full enjoyment of Title VII rights sometimes requires that the court remedy the present effects of past discrimination. *See* Louisiana v. United States, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965). This includes both redressing the continuing effects of discriminatory seniority systems, Local 189, United Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969); United States v. Jacksonville Terminal Co., *supra;* United States v. Hayes International Corp., *supra* [5 Cir., 456 F.2d 112], and affirmative action to alter a seniority system which is not discriminatory on its face. If the present seniority system in fact operates to lock in the effects of past discrimination, it is subject to judicial alteration under Title VII. Local 53, International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047, 1052 (5th Cir. 1969); Local 189, *supra*, at 991 of 416 F.2d." 474 F.2d at 927.

for the apprentice program. Applicants are required to have the following qualifications: (1) a high school education or its equivalent, (2) employment in the same department and/or trade for a minimum of six months, (3) prior to March 31, 1971, achievement of the fiftieth percentile on the California Test of Mental Maturity and a passing score on all aptitude tests for the particular skill or craft, (4) under twenty-six years of age or under thirty years of age for those applicants having served in the military. Once selected for an apprenticeship, the trainee has to complete an 8,000 hour course, approximately three and one-half to four years. During this time, the employee receives a starting salary at a pay rate 3, but works up to the higher rate of 11. After finishing the apprenticeship and after being placed into a craft position, the employee is eligible for a pay rate 12 or 13.

Appellants assert (1) that the continued high school education or its equivalent requirement constitutes a *present* discriminatory practice and (2) that the past intentional exclusion of black employees from craft jobs and the illegal testing has a continuing adverse impact under current neutral practices. Concerning the apprentice program, the district court declared: "Defendant has practiced no invidious racial discrimination in the administration of its apprenticeship and journeyman programs." We reverse this finding as "clearly erroneous."[59]

We agree with appellants that the educational requirement is not neutral This standard, itself, is a *present* discriminatory practice if it has a disproportionate impact on black applicants. Griggs v. Duke Power Co., *supra*; United States v. Georgia Power Co., *supra*, 474 F.2d at 918-919; United States v. Inspirational Consolidated Copper Co., *supra*, 6 EPD ¶ 8918.

From 1915 until the time of the trial, only one black employee had ever participated in the apprentice program, while 208 white employees have done so. Moreover, from 1915 until 1961, the total exclusion of black employees from craft

[59]See note 56, *supra* at 234.

jobs was a culpable company policy. We have previously discussed the district court's finding that the large majority of black employees have historically and continue to be within the lowest pay groups, 1-8. This educational criterion must continue to have an adverse impact on black employees because 56% do not have a high school diploma.[60] Because of this disproportionate impact, the burden shifts to the company to demonstrate that their high school education or equivalent requirement for entry into the apprentice program is "job related." Griggs v. Duke Power Co., *supra*; United States v. Georgia Power Co., *supra*; United States v. Inspirational Consolidated Copper, *supra*.[61]

The company's response was that their educational standard was not a high school diploma or its equivalent, rather a criterion used to select applicants who had obtained a sufficient educational level to successfully complete the International Correspondence courses relating to the craft for which they were entering an apprenticeship. The district court's finding that a high school education or its equivalent was a prerequisite for the apprentice program rebuts this assertion. Moreover, the company's own policy statement defining their apprentice program states as a qualification – "high school graduate or equivalent." We do, however, construe this argument as both an attempt to show "job relatedness" and "business necessity."[62]

In order to show job relatedness, *Griggs* stated that a requirement must "bear a demonstrable relationship to successful performance of the jobs for which it was used." 401 U.S. at 431. Here, we understand the company to mean that a certain reading level and familiarity with study techniques is necessary to participate in the course work of the apprentice program.

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[60]Of the white employees, 12% do not have a high school diploma.

[61]Under the EEOC guidelines, 29 C.F.R. § 1607.2, an educational requirement is defined as a test. The company made no attempt to validate this requirement under these guidelines which we mandated in *Georgia Power, supra*, 474 F.2d at 913.

[62]We will postpone our analysis of business necessity until III (A), dealing with the required remedial changes in the apprentice program.

This cannot be *equated* with a requirement for a high school education or its equivalent. This Court, in fact, affirmed a district court's condemnation of a similar rationale for a high school educational criterion in *Georgia Power*:

> The justification offered at trial for the requirement was very weak. As the district court observed:
>
> "At best, the only justification for this requirement is the obvious eventual need for above-average ability to read and comprehend the increasingly technical maintenance manuals, the training bulletins, operating instructions, forms and the like demanded by the sophisticated industry. . . . In such a context, the high school education requirement cannot be said to be reasonably related to job performance. This is not to say that such requirements are not desirable . . . it simply means that the 'diploma test' cannot be used to measure the qualities. Many high school courses needed for a diploma (history, literature, physical education, etc.) are not necessary for these abilities. A new reading and comprehension test . . . might legitimately be used for this job need." 474 F.2d at 918.

Here just as in *Georgia Power*, there are employees who have had substantial job success and advancement without a high school education.[63] For example, there are seventy-five white employees,[64] without a high school education, receiving over $4.00 an hour. Of the approximate fifty foremen and forty to fifty leadmen in the plant, twelve foremen and eight leadmen are among this seventy-five. Sixteen of this group are machinists in the machine shop, a highly skilled, craft department; and two are electricians. The high proficiency level established by this standard not only precludes qualified employees but

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[63] In *Georgia Power* we observed:

"Many employees without high school displomas have mastered the technical literature and many of the highest-ranking personnel in the company did not pass the 'diploma test,' including 47 of 100 foremen, supervisors, and chief division operators in the Atlanta and Macon operating division." 474 F.2d at 918-919.

[64] There is only one black employee in the whole plant whose pay rate exceeds $4.00 an hour.

also is not refined sufficiently to measure the ability sought by the company. As the Supreme Court promulgated in *Griggs* and this Court stated in *Georgia Power*, "the use of a high school requirement which has a disproportionate racial impact and has not been proven to be a predictor of ultimate job success controverts the congressional mandate of Title VII."[65] 474 F.2d at 918.

Assuming past discrimination has illegally denied present employees training opportunities, the question becomes: do present neutral prerequisites for entry into and completion of the apprentice program continue to deny these injured employees rightful benefits. The neutral prerequisites challenged by appellants are the *age* requirement and the *length* of the apprenticeship.[66] Appellants argue that the application of the age requirement has the consequence of continuing to exclude from the apprentice program all black employees who are employed and reached the age of twenty-five or twenty-nine before the company ceased its official segregation in 1961. Additionally excluded are those blacks barred by the testing program, who reached the age of twenty-five or twenty-nine before the company ceased its testing program in 1971. Therefore, appel-

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[65]The question whether the educational criterion operated, independently with the testing, to produce this disparity can be answered in the affirmative. The inferences on this issue are unlike the question of the consequences, independent of the testing, of the subjective discretion of the white department superintendents who did all the selecting of supervisory personnel *infra*. The fact that this criterion is objective and acts automatically to eliminate non-high school graduates, coupled with the large percentage of blacks without a high school education and the implication that white employees without high school educations have advanced into responsible and skilled positions in all departments, are sufficient to refute this objection.

[66]Appellants also challenge the six month prerequisite service within the craft department. They argue that because of the long exclusion of black employees from craft departments, this selection criterion perpetuates past discrimination. We agree with this conclusion. However, the record and finding of fact by the district court reflect that employees are *selected* from throughout the plant and *then* evaluated for six months on the job within a craft department; rather than being selected only from employees within the craft department.

lants conclude that this age requirement perpetuates into the present effects of past discrimination and is unlawful.[67]

Appellants deduce that the impact of past discriminatory practices in the apprentice program is blatant from the historical and statistical showing, recited above. In addition, appellants point to the *testimony* by company officials, stating that the effect of the tests and educational requirement was to screen out blacks from the apprentice program. The historical formal exclusion and the statistical and testimonial evidence demonstrating disproportionate exclusion of blacks by the testing and educational requirements, when combined with the continuing use of the high school education or its equivalent standard and the present age requirement and lengthy apprenticeship term, constitutes not merely a *prima facie* case, but *conclusive* proof[68] of present effect from past discrimination.[69]

2. *On-the-job training.* Prior to March, 1971, to qualify for on-the-job training for journeyman status in a craft position, an applicant had to (1) meet the specified testing requirements, the same mental maturity test and aptitude test required for the apprentice program, (2) have three year's experience in a craft department or related craft job, and (3) be selected by the (all-white) supervisory employee group for the program. The company currently relies on a bid system for entry into the on-the-job training program. Under this procedure bids are taken within the craft department and the *senior* qualified man is selected. Only if no bids from qualified men are received from within the departments are employees from outside the

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[67]See note 33 and accompanying text, *supra* at 224.

[68]That a holding of conclusive proof is warranted, we cite our statement in United States v. Jacksonville Terminal Co., *supra*, 451 F.2d at 442:

"Absent explanatory evidence and testimony, the statistics indicate that officials have impliedly equated job qualification with race. *See id.* [United States v. Sheet Metal Workers Local 36, *supra* 416 F.2d] at 127; Lea v. Cone Mills Corp., M.D.N.C.1969, 301 F.2d 97, 102. In a Title VII case, such implications are important. *When combined with other evidence and testimony, they may be conclusive.*" (Emphasis added).

[69]See note 34, for the proposition that some courts have held that statistics *alone* may demonstrate conclusive proof of discrimination.

department allowed to compete. In either case the final selection is determined by the all-white supervisory group. After the trainee has had six years' experience and if his departmental superintendent recommends him to the apprentice committee, the trainee is eligible for the intermediate craft salary rate. After an additional year's experience, the trainee is eligible for the craft rate (pay group 12 or 13).

Appellants argue that the present bidding system and the length of the training program lock in black employees derogated to lower paying, unskilled jobs by past discrimination. The district court, as quoted above, held that the defendant had not violated Title VII or section 1981 in administering its journeyman program. We reverse this holding as "clearly erroneous."[70]

We accepted, *supra* II(A), the court's and appellants' statistical conclusion that black employees had been restricted to jobs in non-craft departments and in the 1-8 pay groups containing no craft or craft related positions, first by the formal exclusion prior to 1961 and then by the testing requirement from 1964 until 1971. To focus even further on this finding, appellants cite the employment data for pay groups 12 and 13, encompassing craft and technical positions. This data compiled two months before trial indicated only seven blacks, .76% of black employees, had reached pay group 12; *none* had obtained a group 13 position. At this time, 436 white employees, 28.4% of the total, occupied group 12 jobs, and twenty-four, 1.5% of the total, held group 13 jobs. An additional factor relied on by appellants is the selection on the subjective evaluation by the all-white supervisory force, both a past and a present prerequisite to entry into the training program. Rowe v. General Motors Corp., *supra*, 457 F.2d at 359 ("we and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action.")[71]

[70]See note 56, *supra* at 234.

[71]Appellants do not challenge this subjective judgment by all-white supervisory group as an independent, present discriminatory practice.

The intentional discrimination by the company from 1915 until 1961 totally excluded black employees from the on-the-job training program. From 1964 until 1971, the testing continued to restrict black employees from craft departments and from craft jobs and craft related positions. We also recognize the discriminatory potential of subjective evaluation of blacks by the all-white supervisory groups.[72] Therefore, we are compelled again to find that past discrimination has had an adverse impact upon black employees' employment opportunities which is carried forward by neutral, current practices. The bidding procedure presently in effect would require black employees long denied this training opportunity in the past, to suffer a loss of seniority and cut in salary for admittance and participation in this training program. The requirement that bids from *within* the craft departments be given initial, primary consideration must fail in light of the proof demonstrating that a large majority of black employees have been excluded from these departments. In addition, a lengthy training program of six years will continue to exclude black employees from craft positions for an unnecessarily longer period. Appellants have presented *prima facie* evidence of the present effect of past discrimination, thus requiring affirmative relief.[73] Cf. McDonnell Douglas Corp. v. Green, *supra*, 411 U.S. at 800-807.

C. *Supervisory Positions*

The appellants question the absence of black employees from the supervisory positions of leadmen and foremen. The district court made the following finding of fact concerning this absence:

> Out of approximately fifty leadmen, only three have been black. Defendant has never had a black foreman.

Rather it is a factor used to bolster their conclusion as to the impact of neutral practices resulting from past discrimination.

[72]For a detailed discussion of the use of subjective criteria in judgment, see text and accompanying footnotes *infra* at 240-242.

[73]See note 58, *supra* at 236.

However, the court drew no specific conclusion of law on the issue of discrimination, other than a general recital at the end of its opinion[74] that the plaintiffs were not entitled to any other relief.

The leadman is the worker who sets the pace for his unit of workers. The general practice is to choose the foreman from the ranks of the leadmen. Prior to March, 1971, there were two qualifications for the positions of leadmen and foremen. First, the candidate had to have obtained the requisite testing achievement. Secondly, the department superintendents, who have always been white, then selected the "best qualified" of these individuals. This selection was based on their subjective judgment rather than objective criteria. The testimony at trial indicated that there were approximately forty to fifty leadmen, of which one was black. Of the approximate fifty foremen none were black.

The statistical disparity presented in this case combined with the illegal testing and a subjective standard applied by all-white department supervisors would normally present a conclusive showing of *present* discrimination. The company, however, terminated their testing requirement for these positions in March, 1971, which was six months prior to the trial in October, 1971. The question for us is whether selection on the basis of subjective judgment of all-white superintendents operates *independently* of the testing to discriminate and helped produce this disparity.

In Rowe v. General Motors Corp., *supra*, 457 F.2d 340, this Court admonished an employer for allowing possible discriminatory subjective evaluation by all-white supervisors in the promotion of black employees. This Court cautioned:

> . . . [H]ad to acknowledge that the methods for promotion/transfer at *GMAD* would enable an individual foreman, if

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[74]The statistical finding by the district court of three black employees as leadmen is an overstatement as the record and the briefs on appeal of *all* parties indicate that only one black employee has been advanced into a supervisory position as a leadman.

> he were so inclined, to exercise racial discrimination in his selection of candidates for promotion/transfer, and that, under the social structure of the times and place, Blacks may very well have been hindered in obtaining recommendations from their foremen since there is no familial or social association between these two groups. All we do today is recognize that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management. We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect nondiscriminatory action. 457 F.2d at 359.

In the past, this Court has ordered the development of objective criteria in order to eliminate the possible discrimination inherent within subjective employment determinations.[75] Local 53 of the International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969). In cases involving similarly alleged racial discrimination for promotions to supervisory positions, courts have acted on a

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[75] *See* Brown v. Gaston County Dyeing Machine Co., *supra*, 457 F.2d at 1382-1983 ("Elusive, purely subjective standards must give way to objectivity if statistical indicia of discrimination are to be refuted."); United States v. Bethlehem Steel Corp., *supra*, 446 F.2d at 655.

Subjective discretion by all-white supervisory personnel is comparable to that found suspicious in jury discrimination suits. In Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970), the Supreme Court concluded:

> "In sum, the appellants demonstrated a substantial disparity between the percentages of Negro residents in the county as a whole and of Negroes on the newly constituted jury list. They further demonstrated that the disparity originated, at least in part, at the one point in the selection process where jury commissioners invoked their *subjective judgment* rather than objective criteria. The appellants thereby made out a prima facie case of jury discrimination, and the burden fell on the appellees to overcome it." *Id.* at 360.

This Court had earlier found jury commissioners' subjective judgment failing in Pullum v. Greene, 396 F.2d 251, 257 (5th Cir. 1968). *See generally*, Jury Discrimination In the South: A Remedy?, 8 Colum.J. of L.Soc. Prob.589 (1972).

showing equal to that made by the appellants here.[78] In United States v. N. L. Industries, *supra*, 479 F.2d 354, the court stated:

> The inference of discrimination provided by the statistics is reinforced by the Company's method of selecting foremen. The Company's promotional plan is very similar to that used by General Motors Corporation in *Rowe, supra*, 457 F.2d 348. In that plan the foreman's recommendation was the indispensible, single most important element in the promotional process; there were no written instructions to foremen as to the qualifications desired; standards that were set were vague and subjective; hourly employees were not notified of promotional opportunities; and there were no safeguards in the procedure to prevent discrimination.
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> We think evidence indicating that out of about 100 foremen only three are black, that these three black foremen are in charge of only Labor department employees, that a black foreman has never been in charge of white employees in this bargaining unit, that one of thirty-six employees promoted to foreman since 1965 was black, that a pool of qualified black employees exist, and that white employees with less qualifications have been promoted to foreman positions presents a prima facie case of racial discrimination that has not been rebutted by the Company.
>
> *Id.* at 368.

And in Russell v. American Tobacco Co., *supra*, 5 EPD ¶ 8447, the court pointed to the holdings of Brown v. Gaston County Dyeing Machine Company, *supra*, 457 F.2d 1377, and Rowe v. General Motors Corp., *supra*, 457 F.2d 348, condemning the lack of objective criteria in the face of a statistical disparity in job promotion as discrimination. The court then concluded:

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[78]In addition to the cases discussed herein, see Stamps v. Detroit Edison Co., *supra*, 365 F.Supp. at 112-113; Young v. Edgcomb Steel Co., 363 F.Supp. 961, 969-970, 971 (M.D.N.C.1973). The Equal Employment Opportunity Commission has entered findings of discrimination in promotion to supervisory positions where a highly subjective promotion system has had a disproportional impact on minority group employees. CCH EEOC Decisions ¶ 6252, ¶ 6228 (1973).

> In the instant case, the figures from the Leaf operation can hardly be surpassed. Of 63 white employees in Leaf (60 regular, 3 seasonal), 27 are foremen. Only 23 regular white employees are not supervisors. Therefore, 45 per cent of all regular whites are supervisors. In considering the same figures for blacks, there are 3 supervisors (76 regular, 124 seasonal). Out of 76 blacks, 3 are supervisors. Even figuring it out to one decimal point, only 3.9 per cent of the regular blacks are supervisors. There figures would chafed the conscience of this Court, even if objective criteria were fully in use, which has not been demonstrated. This lack of objective guidelines and written criteria are some indicia of discrimination. 5 EPD ¶ 8447 at 7191-92.

The record reveals evidence of at least two black employees who, prior to March, 1971, had the requisite qualifications for leadmen or foremen but had been denied promotion.[77] In addition, the record reflects that while many whites had been appointed as "relief leadmen,"[78] no black employees have had such an opportunity. Testimony by two department supervisors, however, indicated that since the testing qualification was dropped, black employees in these departments, steel foundry and mono-cast, are qualified and are under consideration for these supervisory positions. We are uncertain whether the

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[77]Booker T. Powell had made the highest possible score on the qualifying test, had a high school and one and one-half years college education, had worked for the company since 1954, and had extensive experience in many of the jobs in the cleaning shed (the mono-cast department). Moreover, he had even requested consideration for a leadman position.

Further testimony also implied that Willie Dunn was qualified. He had obtained the prerequisite scores, had taught at the company's night school, had attended metallurgy courses on off hours, and was deemed qualified by company officials. Evidently, although the record is confusing on this point, pressure from both white employees and supervisors and black employees, concerning his upgrading, caused a mental breakdown. He is now on medical pension.

[78]While there is no formal training for these supervisory positions, testimony demonstrates that, at least in the mono-cast department, temporary vacancies occur because of vacation, sickness, business and other reasons every week. "Relief" leadmen are appointed from those under consideration for permanent promotion to these positions.

consideration of black employees since the testing was terminated, stems from awareness, stimulated by this and other law suits, by the company of possible legal sanctions, or whether the illegal testing alone had created this discriminatory barrier, and now qualified black employees are being considered. Therefore, we are remanding this issue, the independent effect of subjective evaluation by all-white superintendents, to the district court.[79]

On remand, we point out three indicia, among others, which the district court should examine. First, as to whether there are more examples of black employees who were able to hurdle the illegal testing barriers to these supervisory positions, but then were disqualified under the subjective criteria utilized by the department superintendents.[80] Secondly, the court should note whether less qualified white employees have been appointed leadmen or foremen both prior to March, 1971 and since that time. Finally, the court should obtain evidence of the operation of this subjective standard applied by white supervisors since the trial.[81]

III. RELIEF

In fashioning an appropriate remedy for employment discrimination, Congress has granted courts plenary equitable power under both Title VII, 42 U.S.C.A. § 2000e-5(g) (Supp.

[79]By remanding, we do not mean to close off any back pay award for a black employee, like Booker T. Powell, who might be able to put forward a back pay claim for a supervisory position.

[80]We note that because of the nature of these supervisory positions there is a slow turnover. Consequently, only a few cases of discretionary passover may constitute sufficient proof considering the statistical disparity already existing.

[81]The district court should make specific findings on the assertion in appellee's brief, stating:

"While outside the record, the Company feels it appropriate to advise the Court that currently the Company has two black foremen and five black leadmen."

Appellee's Response to the Brief of United States Equal Employment Opportunity Commission as Amicus Curiae at 8.

1973),[82] and section 1981.[83] Most courts, and expecially our Circuit, have applied this equitable relief within the framework of the "rightful place" theory.[84] In Georgia Power, this Court explained: "Most courts, in molding appropriate remedies, have adhered to the 'rightful place' theory, according to which blacks are assured the first opportunity to move into the next vacancies in positions which they would have *occupied* but for wrongful discrimination and which they are qualified to fill. Note, Title VII, Seniority Discrimination and the Incumbent Negro, 80 Harv. L. Rev. 1260, 1268 n. 2 (1967)." 474 F.2d at 927. We agree that: "This is the theory which should be applied here." *Id.*

Before moving to the necessary corrective measures, there is need to define the class of employees to whom these remedies

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[82]This provision states, in part:

"(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."

See Local 189, Papermakers & Paperworkers v. United States, *supra*, 416 F.2d at 996-997.

This Court has always recognized the importance of granting full relief in Title VII cases. *E. g.*, United States v. Georgia Power Co., *supra*, 474 F.2d at 927; Vogler v. McCarty, 451 F.2d 1236, 1238-1239 (5th Cir. 1971).

[83]*See* Boudreaux v. Baton Rouge Marine Contracting Company, 437 F.2d 1011 (5th Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), cert. denied, 401 U.S. 948, 91 S.Ct. 935, 28 L.Ed.2d 231 (1971); Lazard v. Boeing Company, 322 F.Supp. 343, 345-346 (E.D.La. 1971); Tolbert v. Western Electric, 56 F.R.D. 108, 115-116 (N.D.Ga.1972).

[84]This theory of relief for employment discrimination was explicated in Note, Title VII, Seniority Discrimination and the Incumbent Negro, 80 Harv.L.Rev. 1260 (1967), first applied by our Circuit in United States v. Local 189, United Papermakers & Paperworkers, 301 F.Supp. 906 (E.D.La. 1969), aff'd., 416 F.2d at 988, and recently endorsed in Bing v. Roadway Express, Inc., *supra*, 485 F.2d at 450-451; and United States v. Georgia Power Co., *supra*, 474 F.2d at 926-927.

are applicable. The district court, before trial, approved this suit as a class action within Rule 23(b)(2).[85] This class includes black employees, both named and unnamed, who have filed or not filed complaints with the Equal Employment Opportunity Commission. Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), cert. denied, 405 U.S. 916, 92 S.Ct. 931, 30 L.Ed.2d 785 (1972) (section 1981); Jenkins v. United Gas Corporation, 400 F.2d 28 (5th Cir. 1968) (Title VII); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968) (Title VII). Specifically, this class is composed of black employees of the company employed prior to March 8, 1971, termination date of the testing and educational requirements for pay groups 9-16, and also embraces those black employees hired after March 8, 1971 harmed by *present* discriminatory practices.

A. *Enjoining the Testing and Educational Requirements*

The district court recognized that the testing and educational criteria had a detrimental impact on black applicants and employees as a class. An injunction against the resumption of such practices was denied because the company had eliminated the educational hiring requirement and all testing in March, 1971. We find no abuse of discretion in the district court's refusal to grant such an injunction. *Cf.* Parham v. Southwestern Bell Telephone Co., *supra*, 433 F.2d at 429-430.

However, the high school educational criterion for admittance to the apprentice program remains in use. It was earlier held violative of Title VII and section 1981.[86] At that point we reserved the discussion of the "business necessity" justification. This doctrine has evolved to except those few employment practices, which are *non-intentionally* discriminatory or neutral, but perpetuate the consequences of past discrimina-

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[85]See note 4 and accompanying text, *supra* at 217.

[86]*See* II(C)(1), *supra*. The appellants are not challenging job-relatedness of the course work required by the apprentice program, only the high school educational or equivalent requirement. *See* Buckner v. Goodyear Tire and Rubber Co., 339 F.Supp. 1108, 1122-1125 (N.D.Ala.1972).

tion, because of their overriding business necessity.[87] *See* Griggs v. Duke Power Co., *supra*, 401 U.S. at 431-432; United States v. N. L. Industries, *supra*, 479 F.2d at 364-366; Robinson v. Lorillard Corp., *supra*, 444 F.2d at 797-798. Once a discriminatory result is demonstrated, the defendant has the burden to justify a practice under a "business necessity."[88] The nature and requirements of this burden were correctly outlined in Robinson v. Lorillard Corp., *supra*, 444 F.2d at 798:[89]

> Collectively these cases conclusively establish that the applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose ad-

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[87] In United States v. St. Louis-San Francisco Railway Co., *supra*, 464 F.2d 301, the Eighth Circuit Court of Appeals, en banc, explained:

> "However, this doctrine of business necessity which has arisen as an exception to the amenability of discriminatory practices, 'connotes an irresistible demand.' The system in question must not only *foster* safety and efficiency, but must be *essential* to that goal. United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972). In other words, there must be no acceptable alternative that will accomplish that goal 'equally well with a lesser differential racial impact.' Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); *accord* United States v. Bethlehem Steel Corp., *supra*, 446 F.2d at 662." *Id.* at 308.

[88] Rowe v. G. M. C., *supra*, 457 F.2d at 355 n. 14; United States v. Jacksonville Terminal Co., *supra*, 451 F.2d at 451; Long v. Georgia Kraft Co., *supra*, 450 F.2d at 562; Bing v. Roadway Express, Inc., *supra*, 444 F.2d at 690-691; Local 189, United Papermak. & Paperwork. v. United States, *supra*, 416 F.2d at 989-990.

[89] The determinants under the *Robinson* formulation have essentially been applied by this Court, dressed in different wording, in United States v. Jacksonville Terminal Co., *supra*, 451 F.2d at 451; and Local 189, United Papermak. & Paperwork. v. United States, *supra*, 416 F.2d at 989.

vanced, or accomplish it equally well with lesser differential racial impact.

As our holding *supra* makes clear, a high school diploma or equivalent criterion does not effectively measure the reading and study skills necessary for the course work required by the apprenticeship. There are also alternative methods, such as a validated reading test suggested by the district court in *Georgia Power*,[90] which would have a lesser racial impact. Moreover, since there is a large demonstration of successful employee achievement without a high school diploma, a discriminatory standard, by definition, cannot be a "business necessity." We, therefore, conclude that the district court should enjoin the continued use of a high school educational requirement for entrance into the apprentice program.

B. *Restructuring and Promotion Procedures*

1. *Business necessity.* The company argues "business necessity" to justify the continued use of its promotion practices – seniority and the posting and bidding procedures. The company insists that its jobs are functionally related, so that service in each position provides necessary training for the next higher job in a line of progression within a department. In United States v. Jacksonville Terminal Co., *supra*, 451 F.2d 418, this Court explained the heavy nature of the defendant's burden to justify a discriminatory seniority system:

> . . . We have no doubt that the seniority systems and restrictions currently enforced at the Terminal contributed to its safe and efficient operation. Nevertheless, as the Second Circuit most recently explained, "the 'business necessity' doctrine must mean more than that transfer and seniority policy serve legitimate management functions. Otherwise, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of past discrimination. • • • Necessity connotes an irresistible demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of

[90] 474 F.2d at 918.

> a plant, but also be essential to those goals. * * * If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effect, then the present policies may not be continued." United States v. Bethlehem Steel Corp., 2d Cir. 1971, 446 F.2d 652, 662 [1971]. In other words, management convenience and business necessity are not synonymous. Thus the Terminal was required to prove not only that the seniority systems and restrictions promote safe and efficient operation but also that they are essential to these goals. *Id.* at 451.

Under the three prongs of the *Robinson* standard,[91] the business purpose, training to insure safe and efficient plant operation, must be "sufficiently compelling to override any racial impact;" the department seniority system must effectively and efficiently carry out its training purpose; and there must be no alternate acceptable practice of accomplishing this training. In an industry involving sophisticated machining processes such as many of the operations of this company, training of employees for skilled positions is a necessary function for the continued economic life of the business. However, a *departmental* seniority system is effective and efficient as an instruction program only as to those positions in a line of progression where the jobs below them on the ladder serve as prerequisite training steps.[92]

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[91] 444 F.2d at 798, n. 6 and 7.

[92] In Robinson v. Lorillard Corp., *supra*, the company justified their departmental seniority system by asserting "that employees will perform a job more efficientlyy if they have prior experience in other jobs within the same department." *Id.* at 799. In rejecting it, the court made the following caveat:

> "Finally, it is difficult to imagine how even the necessity for job progression could constitute the business necessity which would justify a departmental seniority system that perpetuated the effects of prior discriminatory practices. For, after all, seniority is necessarily an inefficient means of assuring sufficient prior job experience. It may take only six months to learn a job well and become qualified for advancement. Yet the vagaries of chance may present an opportunity for advancement in only six weeks or not for six years. When some employees have been discriminatorily denied entry to the department, an alternate promotion system could advance the employee who has been discriminated against if he has the greatest employment seniority and has served the

Thus, in a departmental line of progression where the positions do not require specific training[93] or where on-the-job experience in *another* department qualifies an employee,[94] a departmental seniority system is not efficient and it is certainly not the best training method.[95]

The company has evidence in the record that significant portions of its operations require skillful craftsmanship, but it has failed to demonstrate that every position at the plant is so complex or specialized as to require, without exception, step by step job progression within each department. The record discloses no proof by the company that positions in other than craft or technical lines of progression are functionally related. The plaintiffs themselves admit that craft positions require specific prerequisite training and experience. But we read the dis-

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necessary minimum time in his present job or has satisfactorily established his capacity to handle the job. Such an alternate plan would accomplish the business purpose 'equally well with a lesser differential racial impact.' " *Id.* at 799-800.

[93]In pointing out the inability of a departmental seniority system to meet the business necessity test because it was ineffective and inefficient in furthering promotion by ability into jobs requiring no specific training, the court in United States v. N. L. Industries, *supra*, 479 F.2d at 366, observed:

"In regard to the alleged need for prior experience within a department, we again point out that National Lead maintains no lines of progression within departments or between departments. The sole determinant for job selection is seniority and only seniority—not ability. Thus, as in *St. Louis-San Francisco Railway, supra*, 464 F.2d at 309, 'length of service becomes synonymous with qualified.' "

See Robinson v. Lorillard Corp., *supra*, 444 F.2d at 799-800.

[94]Courts have refused the business necessity rationale and ordered carry over of employment seniority instead of job seniority where blacks have been excluded from a certain line of jobs and where by their prior experience, they are qualified for these positions. *E. g.*, Bing v. Roadway Express, Inc., *supra*, 485 F.2d at 449-452; 444 F.2d at 689-691; United States v. St. Louis-San Francisco Railway Co., *supra*, 464 F.2d at 308-309. In *Railway*, the court allowed black train porters to carry over their seniority into formerly all white brakemen positions because of their training in performing braking functions as porters. This occurred even though there was a separate training line of progression for brakemen. *Id.*

[95]See note 92, *supra*, at 246.

trict court's findings[96] and the record[97] as providing no showing by the company that other lines of progression are functionally related.[98] Robinson v. Lorillard Corp., *supra*, 444 F.2d at 799.

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[96]The district court's findings appear to be inconsistent. The court states at finding #13:

". . . The jobs in the lines of progression as practiced in each department are functionally related, one to the other, to afford training and experience to the incumbent necessary to advance and perform proficiently the higher rated jobs, and are functionally related to the performance of the department as a whole."

But then at finding #34, the court states:

"The defendant does not maintain formal lines of progression in any of its departments. Pay groups or wage progression schedules govern the advancement of employees."

The answer to this apparent riddle is the conclusion of law drawn by the district court on the issue of business necessity:

"Alternately, the second question [business necessity], on this record, is deserving of an affirmative answer. The efficiency of defendant's operations is not only promoted by, but it also requires, service in a lower job qualification as a condition to promotion to a higher, *functionally* related one." (Emphasis added).

We think this clearly marks out that only to those jobs in lines of progression shown by the company *to be functionally related* does this finding of business necessity attach. The record thus far clearly reveals that only the craft positions are functionally related.

[97]The testimony of the vice president and works manager and the department superintendents at trial indicates that in the mono-cast and pipe foundry employees within and without the department moved freely in the lines of progression; that in the mono-cast, inspection, and pipe foundry departments there is often jumping of positions in the lines of progression; that in the mono-cast, inspection, pipe foundry, fittings foundry, and steel foundry departments there are jobs which are similar to positions within other departments (e. g., forklift operator, crane operator, welder) from which skills can be transferred without training on the other departments' lines of progression; and that the machine shop has very few positions able to utilize skills learned in other parts of the plant. The plaintiffs' expert witness noted even more examples of where skills acquired in other department could be transferred to a job in another department, positions where no specific prerequisite training was necessary and places where jumping within the line of progression was possible. Lastly, evidence indicated that the lines of progression had only been put down on paper two months prior to trial.

[98]We do not mean that on remand the company is precluded from presenting further evidence of positions requiring specific prerequisite training.

The company here attempts what this Court found unsuccessful in United States v. Jacksonville Terminal Co., *supra*, 451 F.2d at 451-453. There the terminal sought to use a finding that "a few jobs at the Company provide training for other jobs," to establish functional lines of progression to legalize unit seniority under the business necessity rationale. This Court stated:

> . . . The [craft seniority] systems and their concomitant promotion and transfer restrictions protect those with work experience in particular crafts and classes but do not ascertain whether these are the only individuals qualified or the "best qualified" to hold positions in those crafts and classes. *Id.*

In essence, we believe our instructions *infra* to the district court and the court's ability to shape appropriate equitable relief is comparable to the situation in Local 189, United Papermak. & Paperwork. v. United States, *supra*, 416 F.2d at 990, where: "In place of job security the court ordered the institution of a mill seniority system carefully tailored to assure that no employee would have a right to a job that he could not perform properly."

2. *Injunctive relief.* The appellants ask that the district court be directed to require that vacancies be posted initially for *plant-wide* bidding and filled by a qualified employee with the greatest *plant wide seniority.* In addition, red circling[99] and advance entry[100] are requested.

Under the "rightful place theory" we agree:

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[99]Red circling is a standard remedy for eliminating past discrimination which prevented employees from reaching higher jobs and is recognized as necessary since otherwise employees could not afford to take *training* jobs paying lower wages. Where the job from which the employee transfers pays more than the new job, where the new job is in a department where the top wage rate is greater than the rate of the old job, the employee is paid the wage rate of the old job, until he advances to a job paying more than that rate or until he voluntarily freezes himself in at the new job.

[100]Advance entry would allow a transferring black employee to by-pass the entry level positions in a department to take a position higher in the line of progression either which does not require special training or for which his experience in another department qualifies him.

> Under that theory [rightful place theory] blacks are assured "the first opportunity to move into the next vacancies and positions which they would have occupied *but for* wrongful discrimination and which they are qualified to fill." United States v. Georgia Power Co., 5 Cir. 1973, 474 F.2d 906. Thus blacks confined by discrimination to certain positions must be given the opportunity to transfer into the formerly "white" positions as vacancies occur in order to assume their "rightful place." A complete decree must give enough relief to insure that the transferred discriminatees are able to *maintain* their rightful place. Thus the rightful place theory dictates that we give the transferring discriminatee sufficient seniority carryover to permit the advancement he would have enjoyed, and to give him the protection against layoffs he would have had, in the absence of discrimination. Bing v. Roadway Express, Inc., *supra*, 485 F.2d at 450.

Therefore, the district court should issue an injunction requiring: (1) the posting of vacancies plant-wide;[101] (2) the selection of "qualified" personnel for the vacancies on the basis of *plant-wide* seniority;[102] (3) transferring members of the class shall retain their plant-wide seniority for all purposes including promotion, lay-off, reduction-in-force, and recall;[103] (4) ad-

[101] *See* Head v. Timken Roller Bearing Co., *supra*, 486 F.2d at 878-879; Stamps v. Detroit Edison Co., *supra*, 365 F.Supp. at 116-117.

[102] *See* Bing v. Roadway Express, Inc., *supra* 485 F.2d at 451; United States v. Georgia Power Co., *supra*, 474 F.2d at 926-927; United States v. Jacksonville Terminal Co., *supra*, 451 F.2d at 451-453; Griggs v. Duke Power Co., 420 F.2d 1225, 1236-1237 (4th Cir. 1970), rev'd on other grounds, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); Long v. Georgia Kraft Co., 328 F.Supp. 681, 689 (N.D.Ga.1970), rev'd on other grounds, 450 F.2d at 559; Robinson v. Lorillard, 319 F.Supp. 835 (N.D. N.C.1970), aff'd. in part, 444 F.2d 791.

[103] This Court is conscious of the testimony to the effect that part of the plant was to be reconstructed to update the company's method of pipe production, and that this would cause substantial changes, especially in the mono-cast department, resulting in the laying-off of employees. We have observed that past discrimination may penalize black employees in a reduction-in-force situation, and think that affirmative relief is necessary to remedy such effects. United States v. Hayes International Corp., 456 F.2d at 119. *Cf.*, United States v. Jacksonville Terminal Co., *supra*, 451 F.2d at 445-446, 449-450. *See* Williams v. Bethlehem Steel Corp., 468 F.2d 1201 (2d Cir. 1972), cert. denied, 411 U.S. 931, 93 S.Ct. 1893, 36 L.Ed.2d

vance entry into jobs for which an employee in the class is "qualified" or for which no specific training is necessary;[104] (5) red circling of members of the class;[105] (6) establishment of specific residency periods in lines of progression where the company has established prerequisite training as a "business necessity."[106] By the term "qualified" we mean ability which is *not* to be determined solely by reference to experience in the line of progression of a department, *e. g.* a forklift operator in the mono-cast department should be able to transfer to a forklift operator position in the fittings foundry or some other department, or an employee in a grinder position transferring to the inspection department. This has specific application in the advance entry situation. Assume a member of the class requests

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390 (1973); United States v. Bethlehem Steel Corp., *supra* 446 F.2d at 664, 666. The district court should be mindful of this consideration in granting *complete* affirmative relief.

[104]United States v. Hayes International Corp., *supra*, 456 F.2d at 116-119; Long v. Georgia Kraft Co., *supra*, 450 F.2d at 562; Local 189, United Papermak. & Paperwork. v. United States, 301 F.Supp. at 917, aff'd., 416 F.2d 980.

[105]United States v. Bethlehem Steel Corp., *supra*, 446 F.2d at 660, 665; Uniter States v. N. L. Industries, *supra*, 479 F.2d at 375-376; Local 189, United Papermak. & Paperwork. v. United States, *supra*, 301 F. Supp. at 917, 923, aff'd., 416 F.2d 980; Robinson v. Lorillard, *supra*, 319 F.Supp. 835, 839, 843, aff'd. in part, 444 F.2d 791; Clark v. American Marine Corp., 304 F.Supp. 603, 608 (E.D.La.1969).

[106]As the author of one article commented:

> "On the other hand, where the line of progression technique has been adopted simply to channel and rationalize job movements in a departments, other techniques for demonstrating qualifications such as testing or the use of 'probation periods' could be utilized and the 'rightful place' approach applied. Even where the transferring Negroes must follow the established *cursus honorum* of the line of progression, a minimum period of occupancy for each job should be defined, so that Negroes who had worked in a job for the designated period could be presumed to have acquired the skills necessary to be eligible for the next vacancy in the following job." Note, Title VII, Seniority Discrimination and the Incumbent Negro, 80 Harv.L.Rev. 1260, 1279 (1967).

See note 92, *supra* at 246.

See Local 189, United Papermak. & Paperwork. v. United States, *supra*, 301 F.Supp. at 917, 925-930, aff'd., 416 F.2d at 990; Robinson v. Lorillard Corp., *supra*, 444 F.2d at 799-800.

transfer to or bids for a position in another department above the entry level in the line of progression. If by his prior experience or because no training is necessary, he is qualified, advancement from entry level up the line of progression should be by-passed in order to insure this employee his "rightful place."[106a]

By eliminating the initial preference given employees within the department under the posting procedure and by requiring selection on plant-wide seniority, the prior discrimination which denied entrance and accumulation of seniority in the better paying departments to the majority of black employees will be tempered. For those members of the class who obtained entry but were denied accumulation of seniority within a higher paying department, plant-wide seniority will equalize competition for promotion. This restructuring of the bidding and seniority systems and the allowance of advance entry for transfers by black employees will assure the injured class members the opportunity "to move into the next vacancies and positions which they would have occupied but for wrongful discrimination."[107]

However, this does not aid the members of the class denied training and access to higher paying positions because of nonqualification. The red circling is designed for this remedial purpose. Black employees who were earlier blocked but now desire transfer to a department where the top pay grade and advancement opportunities are greater than in their former department, are handicapped by their lack of training for the positions in the new department. Therefore, where a job from which the black employee transfers pays more than the new job in a department where the top pay grade is greater than the rate of the old job, a member of the class shall be paid the wage rate of the old job until he advances to a position paying more

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[106a] *See* Bing v. Roadway Express, Inc., *supra*, 485 F.2d at 449-452, 444 F.2d at 689-691; United States v. St. Louis-San Francisco Railway Co., *supra*, 464 F.2d at 308-309. See note 94, *supra* at 246.

[107] United States v. Georgia Power Co., *supra*, 474 F.2d at 927.

than that rate or until he voluntarily freezes himself in at the new job.

C. *Changes in the Apprentice and On-The-Job Training Programs*

While restructuring the promotion procedures will substantially aid the advancement of previously excluded class members into non-craft departments and jobs, the necessary line of progression training will continue to delay obtaining of *craft* positions by black employees. For that reason changes are necessary in the programs, apprenticeship and journeyman, designed to provide training for craft positions.

The age requirement, twenty-five years or twenty-nine for those having served in the military, for entry into the apprentice program is an unnecessary dilatory barrier. The company does not attempt to overcome its racial impact under a "business necessity" rationale.[108] Therefore, the district court should enjoin the continuance of the age prerequisite for the apprentice program. On remand, the company may present evidence that another limit other than the thirty-five years endorsed by plaintiffs' expert should be established, but this would require a compelling interest of the company.[109]

Likewise, the training periods for the apprenticeship and on-the-job training, given the exclusion of black employees, are unnecessarily long. The company has made no showing that the three and one-half to four years for apprenticeship or seven

[108]The company argues that the age and educational qualifications had little or no detrimental effect on black employees because the on-the-job training was available without these prerequisites. Instead of supporting, this argument undermines the company's position. Under the "business necessity" standard an acceptable alternative is *prima facie* proof that such age requirement is *not* necessary for effective and efficient plant operation.

[109]Carter v. Gallagher, 452 F.2d 315, 326 (8th Cir. 1972) (en banc), cert. denied, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972) (employment discrimination under section 1981, maximum age limit raised to thirty-five). Equal Employment Opportunity Commission has found maximum age requirements for apprenticeship to be tainted where they perpetuate past discrimination. CCH EEOC Decisions ¶ 6269, ¶ 6291 (1973).

years for journeymen are periods required by "business necessity." *Cf.*, Local 189, United Papermakers & Paperworkers v. United States, *supra*, 301 F.Supp. at 917, aff'd, 416 F.2d 980. On remand, either by agreement of the parties or order of the court after a hearing, if necessary, the length of the apprenticeship should be shortened with varying periods allowed according to each craft's requirements, and the three years qualifying experience on a craft related job and the length of the on-the-job training, itself, should be shortened.[110] In addition, consideration should be given to broadening the qualifying experience on a craft related job to include comparable experience on jobs *outside* craft departments. The court should examine for adverse impact the use of *subjective* selection criteria, since the trial, in the journeyman program.

On remand, the company may advance reasoning that the present length of the apprenticeship and journeyman are, for training purposes, a "business necessity." However, the district court should pay heed to the conclusions in Moody v. Albemarle Paper Co., 474 F.2d 134, 140 (4th Cir. 1973). In that case, the company hired all employees into a pool. From the pool employees were moved into lines of progression as vacancies occurred. Since the company did not know in advance in which line a vacancy would occur, it required all employees in the pool to be qualified for all the lines. The court, in considering a business necessity argument, held that:

> Albemarle has not shown that hiring all employees into a pool is necessary for the safe and efficient operation of the business, nor has it shown that hiring employees for specific lines of progression is not an acceptable alternative. This they were required to prove to justify their policies under the business necessity test. *Id.*

Similarly, the record here reveals that a craft-trainee for the machine shop is required to operate all machines proficiently. An alternative might be to require a shorter training period

[110]United States v. Operating Engineers, 4 EPD ¶ 7944 at 6507-08 (N.D.Calif.1972).

and to train an employee to operate a particular machine. We recognize, however, that a "jobbing machine shop" is different from a paper factory. The business necessity rationale exists to take into account such situational differences.

D. *Back Pay*

The appellants request back pay for members of the class, arguing that the district court abused its discretion in refusing such an award. The district court had ruled:[111]

> Alternately, in the exercise of discretion, LeBlanc v. Southern Bell T & T Company, 460 F.2d 1228 (5th Cir. 1972), and Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969), the Court declined to award back pay in view of the demonstrated good faith compliance by defendant with Title VII, LeBlanc v. Southern Bell T & T Company, *supra*, and Parham v. Southwestern Bell Telephone Company, 433 F.2d 421 (8th Cir. 1970), and because such an award is not necessary to insure future compliance therewith. Phelps Dodge Corporation v. NLRB, 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271 (1941).

These bases are improper for denying back pay. The district court should structure a back pay decree to conform with the analysis below.

1. *Abuse of discretion.* The standard of review for an appellate court in determining whether a district court has abused its discretion by failing to fully remedy employment discrimination by denying back pay was suggested by the Supreme Court in Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968). The statute there, Title II of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000a-3(b), provided that "the prevailing party" is entitled to a "reasonable attorney's fee" in the *court's "discretion."* The Supreme Court determined that Congress's purpose for enacting this provision limited the scope of discretion which a district court

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[111]The district court, secondarily, relied on a finding that a back pay award would be inequitable. This will be discussed *infra*.

had in denying attorney's fees.[112] Likewise, the parameters of discretion, within which a district court may deny back pay in employment discrimination cases, are defined by the purpose for which Congress enacted, and the courts have interpreted, the statutory back pay provisions.[113] Congress in authorizing courts, expressly under Title VII[114] and impliedly under section 1981,[115] to grant equitable relief to persons harmed by employment discrimination, included the discretion to award back pay. This Court[116] and commentators[117] have noted that the

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[112]The Supreme Court outlined how this discretion should be exercised: "It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. at 402.

[113]In applying the standard of review modeled after *Piggie Park*, the court in Moody v. Albemarle Paper Co., *supra*, 474 F.2d 134, stated: "Where a district court fails to exercise discretion with an eye to the purposes of the Act, it must be reversed. Wirtz v. B. B. Saxon Co., 365 F.2d 457 (5th Cir. 1966); Shultz v. Parke, 413 F.2d 1364 (5th Cir. 1969)." *Id.* at 141.

[114]*See* 42 U.S.C.A. § 2000e-5(g) (Supp. 1973).

Although this provision speaks in terms of relief awarded because of "intentional" discrimination, this has consistently been construed by this Court and others to read that "the defendant meant to do what he did, that is, his employment practice was not accidental." Local 189, United Papermakers & Paperworkers v. United States, *supra*, 416 F.2d at 996. *See* Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1006 (9th Cir. 1972); United States v. Jacksonville Terminal Co., *supra*, 451 F.2d at 442-443; Robinson v. Lorillard Corp., *supra*, 444 F.2d at 796-797; Sprogis v. United Air Lines, 444 F.2d 1194, 1201 (7th Cir. 1971), cert. denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971); Jones v. Lee May Motor Freight, Inc., *supra*, 431 F.2d at 250. *But see*, Dewey v. Reynolds Metals Co., 429 F.2d 324, 331 (6th Cir. 1970), aff'd. per curiam, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971) (equally divided court).

[115]Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d at 1375-1380; Head v. Timken Roller Bearing Co., *supra*, 486 F.2d 874-875; Brown v. Gaston County Dyeing Machine Co., *supra*, 457 F.2d 1377; Caldwell v. National Brewing Co., *supra*, 443 F.2d 1044; Sanders v. Dobbs Houses, *supra*, 431 F.2d at 1101; Lazard v. Boeing Co., *supra*, 322 F.Supp. 345-346. *Cf.* Sullivan v. Little Hunting Park, *supra*, 396 U.S. at 238-240.

[116]Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d at 1377 n. 37, 1380, nn. 52-53; United States v. Georgia Power Co., *supra*, 474 F.2d at 921, n. 19.

[117]Davidson, "Back Pay" Awards Under Title VII of the Civil Rights Act of 1964, 26 Rutgers L.Rev. 741, 741-42 (1973) (hereinafter cited as

provision for back pay in Title VII was modeled on the similar provision in the National Labor Relations Act, 29 U.S.C.A. § 160(c), whose object is "designed to vindicate the public policy of a statute by making the employees whole for losses suffured on account of an unfair labor practice."[118] Nathanson v. NLRB, 344 U.S. 25, 27, 73 S.Ct. 80, 97 L.Ed. 23 (1952). An award of back pay has been recognized by this Court as not a "mere adjunct of some more basic equity" but as an "integral part of the whole relief which seeks, not to punish the respondents but to compensate the victim of discrimination." United States v. Georgia Power Co., *supra*, 474 F.2d at 921. Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d at 1375; Johnson v. Georgia Highway Express, *supra*, 417 F.2d 1122. Under Title VII and section 1981 the injured workers must be restored to the economic position in which they would have been *but for* the discrimination – their "rightful place."[119] Because of the compensatory nature[120] of a back pay award and because

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Back Pay); Comment, Developments in the Law–Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1259 n. 349 (1971).

[118]The rationale for a back pay award under section 1981 is similar, but, of course, other types of damages might also be possible under section 1981. Lazard v. Boeing Company, *supra*, 322 F.Supp. at 345-346. *Cf.* Sullivan v. Little Hunting Park, *supra*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386; Head v. Timken Roller Bearing Co., *supra*, 486 F.2d at 874-875.

[119]This rationale that back pay is compensatory in nature and necessary in order to grant full relief in employment discrimination suits has been recognized by other courts, also. *See* Head v. Timken Roller Bearing Co., *supra*, 486 F.2d at 876-878; Moody v. Albemarle Paper Co., *supra*, 474 F.2d at 141-142; Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969); Stamps v. Detroit Edison Co., *supra*, 365 F.Supp. at 119, 121-122; Tidwell v. American Oil Co., 332 F.Supp. 424, 437 (D.Utah 1971).

[120]From the employer's viewpoint back pay may be a punishment. But just as the National Labor Relations Act, Title VII was written to protect the employee. Not only has the company violated a strong public policy against racial discrimination here, but it has substantially injured this class of black workers. "As between the obviously innocent discriminatee and the employer who may have some equities on his side [good faith], it seems fairer to require the employer with his usually superior resources to bear the loss. This generous approach with an emphasis on compensation of the employee is found in the NLRA cases and in several noteworthy Title VII decisions." Back Pay, *supra* note 117, at 745, nn. 33, 34.

of the "rightful place" theory, adopted by the courts, and of the strong congressional policy, embodied in Title VII, for remedying employment discrimination, the scope of a court's discretion to deny back pay is narrow. Head v. Timken Roller Bearing Co., *supra*, 486 F.2d at 876; Moody v. Albemarle Paper Co., *supra*, 474 F.2d at 141-142. Once a court has determined that a plaintiff or complaining class has sustained economic loss from a discriminatory employment practice, back pay should normally be awarded unless special circumstances are present.[121]

The district court's reasons for denying back pay must next be examined for evidence of "special circumstances."[122] The primary contentions relied on by the court were (1) that the company had demonstrated good faith compliance with Title VII and (2) that a back pay award was not necessary to insure future compliance by the company. As expounded earlier the raison d'etre of a back pay award is to compensate victims of discrimination for economic loss, not to punish the discriminating employer or insure future compliance. Neither the past good faith of the company nor the possibility of future violations of Title VII is relevant. Whether black workers were economically injured by unlawful discrimination and require a back pay award to make them whole is the issue.

As to an assertion of good faith, the Supreme Court in *Griggs* pointed to *consequences* not motives. 401 U.S. at 432. Likewise, this Court has specifically rejected good faith as a defense to a back pay award in Johnson v. Goodyear Tire & Rubber

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[121]Both the Fourth Circuit and Sixth Circuit Courts of Appeal have adopted this standard. Head v. Timken Roller Bearing Co., *supra*, 486 F.2d at 876; Moody v. Albemarle Paper Co., *supra*, 474 F.2d at 142.

[122]Courts, in the past, have denied back pay for a variety of reasons: (1) the unsettled nature of the law concerning a particular practice, *compare* United States v. St. Louis-San Francisco Railway Co., *supra*, 464 F.2d at 311, 313, *with* United States v. N. L. Industries, *supra*, 479 F.2d at 378-380; (2) the good faith of an employer, United States v. St. Louis-San Francisco Railway Co., *supra*; Baxter v. Savannah Sugar Refining Corp., *supra*, 350 F.Supp. at 146; (3) a state statute conflicting with Title VII (see the cases cited at note 125, *infra* at 254); (4) and impossibility of determining the period for which back pay is to be awarded, United States v. St. Louis-San Francisco Railway Co., *supra*.

Co., *supra*, 491 F.2d at 1375-1377, n. 37. In rejecting good faith as a proper legal basis for denying back pay here, we adopt the reasoning of the court in Robinson v. Lorillard, *supra*, 444 F.2d 791:[123]

> Next it is argued that back pay should not be awarded in the absence of specific intent [good faith] to discriminate. A corollary argument is that the award was improper in light of the unsettled state of the law. The principal answer to both points is that back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss, however benevolent the motives for its imposition. *Id.* at 804.

See Head v. Timken Roller Bearing Co., *supra*, 486 F.2d at 877; Moody v. Albemarle Paper Co., *supra*, 474 F.2d at 141. *But see*, United States v. St. Louis-San Francisco Railway Co., *supra*, 464 F.2d at 311, 313; Baxter v. Savannah Sugar Refining Corp., *supra*, 350 F.Supp. 146. *Compare* United States v. St. Louis-San Francisco Railway Co., *supra*, *with* United States v. N. L. Industries, *supra*, 479 F.2d at 378-380.

The issue of future compliance is of course pertinent in deciding whether or not to provide equitable relief against future discriminatory practices, *e. g.* a permanent injunction. Back pay, however, is an equitable award for *past* economic injury.

The district court, secondarily, relied on a finding[124] as to

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[123]This Court in Rowe v. GMC, *supra*, 457 F.2d 348, set out with particularity the good faith of General Motors. *Id.* at 355-356. Nevertheless, the case was remanded with instructions for the district court to, "of course include the appropriate remedy, back pay, limited or full, etc., as needed to effectuate the Act." *Id.* at 360. Compare the good intent of the employer in *Griggs*. 401 U.S. at 432.

[124]In finding #31, the court stated:

"Any award of back pay would penalize those black employees, as well as white employees, who strove to improve themselves and their job performance during the period in question. Due to the laudable and unique 'extra compensation' plan whereby no earnings are paid outside the company and the employees, both black and white alike, share in the earnings of the defendant, any award of back pay would reduce the earnings of the company available for distribution to the employees, and would penalize all employees of the company. An award

the "inequity" of granting back pay. The discretion a court has under the "special circumstances" standard encompasses a denial of back pay on the grounds of substantial injustice. Moody v. Albemarle Paper Co., *supra*, 474 F.2d at 142. *Cf.* Newman v. Piggie Park Enterprises, *supra*, 390 U.S. at 402.

The "special circumstances" where an unjust result has prevented an award of back pay have been narrow. The most numerous are sex discrimination suits where conflicting state legislation, which limit work hours or impose weight lifting limits or the like for women employees, require a practice in violation of Title VII. In these cases the courts have properly declined to award back pay because "state statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared."[125] Davies Warehouse Co. v. Bowles, 321 U.S. 144, 153, 64 S.Ct. 474, 479, 88 L.Ed. 635 (1944). However, a back pay decree is appropriate in those cases where a limitation is not imposed by a state statute but by the employer,[126] or where the employer is put on notice of a judicial or definitive administrative determination of the invalidity of the state law.[127]

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of back pay to black employees who were passed over for better jobs for a lack of appropriate test score, when there were also white employees who were not promoted for the same reason, would be an inequitable and unconscionable result. An award of back pay to black employees who were passed over for better jobs for a lack of appropriate test scores, when the job vacancy was awarded a black employee with the appropriate test score would likewise be an inequitable and unconscionable result, and unauthorized by Title VII since no racial overtone can be attributed by the selection of one black over another black."

[125]*E. g.*, Kober v. Westinghouse Electric Corp., 480 F.2d 240, 246-250 (3rd Cir. 1973); United Steel Workers of America, Local 1104 v. United States Steel Corp., 478 F.2d 1255 (6th Cir. 1973); Manning v. International Union, 466 F.2d 812 (6th Cir. 1972), cert. denied, 410 U.S. 946, 93 S.Ct. 1366, 35 L.Ed.2d 613 (1973); Weeks v. Southern Bell T & T Co., 408 F.2d 228 (5th Cir. 1969); LeBlanc v. Southern Bell T & T Co., 333 F.Supp. 602 (E.D.La. 1971), aff'd. per curiam, 460 F.2d 1228 (5th Cir.), cert. denied, 409 U.S. 990, 93 S.Ct. 320, 34 L.Ed.2d 257 (1972).

[126]Bowe v. Colgate-Palmolive Co., *supra*, 416 F.2d 711 (weight lifting limitation).

[127]*Compare* Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) *with* Schaeffer v. San Diego Yellow Cabs, *supra*, 462 F.2d 1002.

In this case, except for the "extra compensation" plan the district court clearly erred in its conclusions regarding injustice to the company.[128] Even the argument that distributions to employees out of earned surplus (the extra compensation plan) would be reduced, penalizing all employees, is hyperbolic and misleading. Since the workers are, in essence, the stockholders of the company,[129] they, *like any stockholders*, should help bear the burden of a back pay award. Any injustice results from the fact that this class of black workers will again be penalized economically. Moreover, a majority of white employees have enjoyed swifter job advancement with consequential salary increases *because* qualified black workers have been discriminatorily hampered in competition for promotion. At the same time a majority of black employees endured substantial economic losses. To assert now that reductions in the distribution from earned surplus which *all* employees will suffer can somehow defeat an award of back pay is peculiarly unpersuasive.

The present suit offers an additional situation falling within "special circumstances." Since the plaintiffs allege violations of 42 U.S.C.A. § 1981, as well as Title VII, a back pay award might be thought to extend to a period prior to July 2, 1965, the effective date of Title VII, under section 1981, sub-

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Since the Supreme Court indicated in *Griggs* (401 U.S. at 443-444) that administrative interpretations by the EEOC, as the enforcing agency, are entitled to great deference, a definitive administrative ruling on a conflicting state statute may be sufficient notice. 29 C.F.R. §§ 1604.1(b), 1604.2(b). *See* Schaeffer v. San Diego Yellow Cabs, *supra*, 462 F.2d at 1007-1008; Manning v. International Union, *supra*, 466 F.2d at 816. *Cf.* 42 U.S.C.A. § 2000e-12(b).

[128]Since promotion continues to be determined by plant-wide seniority and ability, no employees are hurt because they improved their position during this period of discrimination. The testing had a discriminatory effect on black employees as *compared* to white workers. In other words, these tests were probably accurate measuring devices as applied to white employees but not as applied to black employees. *Qualified* black workers were not being promoted with their white co-workers or fellow black employees able to hurdle the improper testing.

[129]See the explanation of the company's unusual organization, *infra* at IV.

ject to the applicable statute of limitations.[130] Head v. Timken Roller Bearing Co., *supra*, 486 F.2d at 874-875; Brown v. Gaston County Dyeing Machine Co., *supra*, 457 F.2d 1377 (back pay ordered for 1961 to 1962 under section 1981). In this Circuit, private employment practices were not held violative of section 1981 until 1970 in Sanders v. Dobbs House, *supra*, 431 F.2d at 1099, although the Supreme Court laid the foundation for this holding in 1968 in Jones v. Alfred H. Meyer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968).[131] The question becomes whether a back pay award under section 1981 for a period prior to 1970 (or 1968 or 1965) constitutes a substantial injustice because of lack of notice to employers of a *statutory scheme* prohibiting discriminatory employment practices.[132]

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[130]This Court in Boudreaux v. Baton Rouge Marine Contracting Co., *supra*, 437 F.2d at 1017 n. 16, indicated that the state statute of limitations governing contract claims, specifically back wages, is controlling on a back pay claim under section 1981. *See* Green v. McDonnell Douglas Corporation, 463 F.2d 337, 340-341 (8th Cir. 1972); Young v. International T. & T. Co., *supra*, 438 F.2d at 763. In *Boudreaux*, it was also established that the statute of limitations is tolled when a plaintiff seeks relief, such as filing a complaint, through the EEOC. *See* Culpepper v. Reynolds Metal Co., 421 F.2d 888, 891-893 (5th Cir. 1970); Henderson v. First National Bank of Montgomery, 344 F.Supp. 1373, 1376-1377 (M.D.Ala. 1972).

[131]It is clear that applying section 1981 to private employment practices in effect prior to these decisions is not a question of retroactivity. In Miller v. Amusement Enterprises, 426 F.2d 534 (5th Cir. 1970), this Court stated:

"In our former decision we were not dealing with retroactive effect of a change in the law, we were dealing with the effect of a statute which was in force at the time of Appellee's racially discriminatory actions. The question was whether the Civil Rights Act of 1964 covered the activities under scrutiny. If so, the Courts—trial or appellate—were to so declare together with such remedial sanctions as were appropriate. But the actions of Fun Fair Park became subject to the prescribed judicial relief not because the Court said so, but rather because the Court said—even perhaps for the first time—that the Congress said so." *Id.* at 536.

[132]We are not intimating that the unsettled nature of the law concerning a particular practice can defeat a back pay claim. There is substantial difference between lack of notice of a statutory scheme prohibiting, for the first time, all discriminatory employment practices and lack of notice that a practice which excludes blacks from hiring or promotion, violates such

The specific prohibitions of Title VII were adequate notice to employers post July 2, 1965. Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d at 1378. In Schaeffer v. San Diego Yellow Cabs, *supra*, 462 F.2d at 1007-1008, the court found back pay applicable from the time the employer had notice that a state statute, conflicting with Title VII, was invalid. Similarly, here the company was put on sufficient guard by the enactment of Title VII to be found liable for back pay under section 1981 as of July 2, 1965. However, following the reasoning of this Court's decision in Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d at 1378, 1379, we conclude that back pay awards under section 1981 should not cover any period of employment prior to the effective date of Title VII because of insufficient notice. Brown v. Gaston County Dyeing Machine Co., *supra*, 457 F.2d at 1385-1387 (Dupree, dissenting in part).

2. *Persons entitled to back pay.* In *Georgia Power*, this Court expressly left undecided the question of "the availability of back pay to non-named class members in § 2000e-5 (g) actions." 474 F.2d at 919 n. 16. This Court, most recently answered this question affirmatively in Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d 1375.

Whether unnamed class members, who have not filed charges with the EEOC, may be included in a back pay award in a private Title VII suit is a question that must be considered both in light of Title VII and section 1981 requirements and of the limits imposed by Fed. R. Civ. P. 23, pertaining to class actions.[133] Title VII does not exclude unnamed or non-filing class members from a back pay decree because of failure to ex-

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a statutory scheme. Miller v. Amusement Enterprises, *supra*, 426 F.2d at 536. This defense, the unsettled nature of the law, has been specifically rejected by this Court in Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d at 1377, n. 41, and by the Court of Appeals for the Fourth Circuit in Moody v. Albemarle Paper Co., *supra*, 474 F.2d at 141; and Robinson v. Lorillard Corp., *supra*, 444 F.2d at 804. *Contra*, United States v. N. L. Industries, *supra*, 479 F.2d at 378-380.

[133]This subject is thoroughly treated in Comment, Back Pay In Class Actions and Pattern or Practice Suits Under Title VII of the Civil Rights Act of 1964, 23 Emory L.J. 163, 165-78 (1974), and Back Pay, *supra*, note 117, at 747-51.

haust remedies, 42 U.S.C.A. § 2000e-5 (a) - (e) (1972), with the EEOC. Courts have allowed employees who have filed with the EEOC to represent a class whose members have not all filed[134] and have approved the intervention of non-filing class members.[135] The basis for these decisions is that the opportunity for investigation and conciliation by the EEOC is adequately fulfilled by the filing of one charge of discrimination against an employer, so that filing further claims would be superfluous. Furthermore, even if Title VII restricted class membership for back pay purposes to named persons who had filed a charge with the EEOC, section 1981 would independently support an unrestricted class award of back pay.[136]

A class-wide back pay award is limited by Rule 23 only to the extent that the class might not be maintainable under subdivision (b) (2).[137]

Subdivision (b) (2) requires:

> (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

The crucial language is "injunctive relief" or "corresponding declaratory relief." The issue is whether an award of back pay qualifies as such or can be included as relief in a (b) (2) class action.

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[134]*E. g.*, Head v. Timken Roller Bearing Co., *supra*, 486 F.2d at 876, n. 9; Moody v. Albemarle Paper Co., *supra*, 474 F.2d 134; Robinson v. Lorillard Corp., *supra*, 444 F.2d at 801-802; Sprogis v. United Air Lines, *supra*, 444 F.2d at 1201-1202; Oatis v. Crown Zellerbach Corp., *supra*, 398 F.2d 496; Stamps v. Detroit Edison Co., *supra*, 365 F.Supp. at 120-122. *Cf.* United States v. Georgia Power, *supra*, 474 F.2d at 925; Johnson v. Georgia Highway Express, *supra*, 417 F.2d at 1125; Miller v. International Paper Co., 408 F.2d 283, 288-291 (5th Cir. 1969).

[135]*E. g.*, Bowe v. Colgate-Palmolive Co., *supra*, 416 F.2d at 719-721.

[136]Caldwell v. National Brewing Co., *supra*, 443 F.2d 1044; Young v. International T & T Co., *supra*, 438 F.2d 757; Henderson v. First National Bank of Montgomery, *supra*, 344 F.Supp. at 1376-1377.

[137]Only subdivision (b) (2) is alleged in the plaintiffs' complaint. Subdivision (b) (3) is also available. *See* Bing v. Roadway Express, *supra*, 485 F.2d at 447.

Subdivision (b) (2) is "keyed to the effect of the relief sought, and the pragmatic ramifications of adjudications in each situation, rather than any special attributes of the class involved." 3B Moore's Federal Practice ¶ 23.45 [1] at 703 (2d Ed. 1969). In other words, the language, " 'final injunctive relief or corresponding declaratory relief' is 'appropriate,' " describes the situation in which a class can be recognized, as one in which this type of relief is appropriate. This is not to be read as saying "thereby making appropriate *only* final injunctive relief or corresponding declaratory relief." All that need be determined is that conduct of the party opposing the class is such as makes such equitable relief appropriate. This is no limitation on the power of the court to grant other relief to the established class, especially where it is required by Title VII and section 1981. *Cf.* Sprogis v. United Air Lines, *supra*, 444 F.2d at 1201-1202. Back pay has been granted by courts in (b) (2) class actions where injunctive or declaratory relief has also been requested,[138] and even where the need for injunctive relief has been obviated before trial by the defendant's own actions.[139]

The objection that back pay will vary from class member to class member is not overriding. Once class-wide discrimination has been demonstrated to result in disproportional earnings, a class-wide decision that back pay is appropriate can be discerned without deciding which members of the class are entitled to what amounts. Robinson v. Lorillard Corp., *supra*, 444 F.2d at 802 n. 14. This is no different than affirmative injunctive relief, in the form of red circling or advance entry, which on

[138]Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d at 1375; Robinson v. Lorillard Corp., *supra*, 444 F.2d at 801-802; Bowe v. Colgate-Palmolive Co., *supra*, 416 F.2d at 720; Baxter v. Savannah Sugar Refining Corp., *supra*, 350 F.Supp. at 141. *See* Head v. Timken Roller Bearing Co., *supra*, 486 F.2d at 876, n. 9; Stamps v. Detroit Edison Co., *supra*, 365 F.Supp. at 120-122. *But see*, Walker v. City of Houston, 341 F.Supp. 1124, 1131-1132 (S.D.Tex. 1971); Muller v. Curtis Publishing Co., 57 F.R.D. 532, 536 (E.D.Pa.1973); 3B Moore's Federal Practice ¶ 23.40 (Supp.1972).

[139]Arkansas Education Association v. Board of Education, 446 F.2d 763, 767-768 (8th Cir. 1971). *Contra*, Baham v. Southern T & T Co., 55 F.R.D. 478, 480-481 (N.D.La.1972).

remand will be applied to particular individuals and not the whole class. *Cf.* Bing v. Roadway Express, *supra*, 485 F.2d at 448, n. 5. No one has suggested that this violates the dictates of subdivision (b) (2). Likewise, the problem of binding unidentified class members may be overcome by particularizing the class members at some point in the litigation[140] or utilizing the notice provision of subdivision (d) (2).[141]

In essence, we think: "This is a case in which final injunctive relief is appropriate and the defendants' liability for back pay is rooted in grounds applicable to all members of the defined class. Under these circumstances the award of back pay, as one element of the equitable remedy, conflicts in no way with the limitations of Rule 23 (b) (2)."[142] Robinson v. Lorillard Corp., *supra*, 444 F.2d at 802. *Cf.* Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d 1364.

3. *Determination of the award.* Having decided that the district court should grant back pay to the members of the class, a multitude of questions arise concerning the period of time

[140]In Bing v. Roadway Express, *supra*, 485 F.2d at 446-449, and Sprogis v. United Air Lines, *supra*, 444 F.2d at 1201-1202, the class was not defined until *after* the trial.

[141]Our recent decision in Bing v. Roadway Express, *supra*, 485 F.2d at 446-449, is illustrative of how notice may be used under subdivision (d) (2). *See* Rosen v. Public Service Electric and Gas Co., *supra* 477 F.2d at 96 n. 11.

[142]The appropriateness of the treatment of back pay claims in a class-wide manner, was outlined in *Back Pay*, *supra* note 117, at 750:

"Subdivision (c) (4) of Rule 23 permits questions individual to each member of the class to be omitted from the class action and left to individual actions. Practical consideration suggests that individual questions in back pay class actions should not be so handled. While questions as to back pay period and rate may not be identical with respect to all members of a class, they may be determined from the same source of evidentiary data: the employer's personnel records and practices. It would doubtless be economical to consider these questions with respect to all class members at the same time. Furthermore, requiring separate actions for back pay would burden courts and counsel alike with duplicative tasks and repetitive paperwork. Finally, discriminatees are often reluctant to sue because of fear. Policies of the Act would best be effectuated if the occasional bold plaintiff could represent his fellow workers. Thus, Title VII actions ordinarily should be treated as class actions for back pay purposes."

encompassed by the back pay, the burden of proof, and the mechanics of computation. Some guidelines for the district court will be set forth.

Initially, we approve the district court's intention of referring the back pay claims to a Special Master, Fed. R. Civ. P. 53. United States v. Wood, Wire & Metal Lathers Int. Union, Local 46, 328 F.Supp. 429, 441 (S.D.N.Y. 1971). However, the court and the parties may also consider negotiating an agreement. *E. g.*, Johnson v. Goodyear Tire & Rubber Co., 349 F.Supp. 3, 18 (S.D. Tex. 1972), 491 F.2d 1364 (5th Cir. March 27, 1974); United States v. Wood, Wire & Metal Lathers, Int. Union, Local 46, *supra* 328 F.Supp. at 444 n. 3. An alternative is to utilize the expertise of the intervening Equal Employment Opportunity Commission to supervise settlement negotiations or to aid in determining the amount of the award.

The period for which back pay should begin is determined by July 2, 1965 or the statute of limitations, whichever is later. The charges, on which this suit is predicated, were filed on November 22, 1965 with the Equal Employment Opportunity Commission. At that point the applicable state statute of limitations for Title VII[143] and section 1981[144] was tolled.[145] The proper Alabama limiting provision, Code of Alabama, Tit. VII, § 26(1) (1960),[146] for back pay for both Title VII and section 1981 sets out a one year limit. Since no claim may extend to a period prior to July 2, 1965 under either Title VII or section 1981, this date marks the beginning of the back pay period.

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[143]In *Georgia Power*, this Court determined that the state statute of limitations concerning wages was to apply to a back pay claim. 474 F.2d at 924.

[144]See note 130, *supra* at 255.

[145]*Cf.* United States v. Georgia Power, *supra*, 474 F.2d at 925.

[146]This provision states:

"All suits and actions for the recovery of wages, overtime, damages, fees or penalties accruing under laws respecting the payment of wages, overtime, damages, fees and penalties, and specifically under the act of congress known as the Fair Labor Standards Act of 1938, . . . shall be brought within one year after the accrual of such cause of action, ..."

The termination date of the back pay period for most claimants will be the date of the district court's decree implementing our decision, but may, depending on the employee's situation, be March 31, 1971, the date testing was ended. First there will be those members of the class, either currently situated or present prior to March 31, 1971, within the predominantly black departments. They are eligible for back pay for the period 1965 to 1971 because of the restrictive effect of the discriminatory testing on their intra-department and inter-department advancement. An employee currently holding a position in these departments would also have been injured up until the date of the decree by the effect of the posting and bidding system. For those class members, currently or in the past, positioned within the predominantly white departments, back pay from 1965 to 1971 is appropriate because the testing limited their advancement within the department. Back pay may be granted from 1971 to the date of the decree to those employees because they were inhibited by the testing from transferring to these departments at an earlier time, thereby handicapping their promotion by denying them the opportunity to accrue departmental seniority. Finally, those workers in the class denied supervisory positions or entrance into the apprenticeship and on-the-job training are eligible for back pay.

This Court has recently addressed the issue of the burden of proof on back pay claims in Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d 1364. This Court pointed out that once a prima facie case of discrimination against the class alleged is made out, a presumption for back pay arises in favor of class members. However, this presumption was found to be tempered by an initial burden on the individual employee to bring himself within the class and to describe the harmful effect of the discrimination on his individual employment position:

> "Therefore, the class represented by Johnson, having established a prima facie case of employment discrimination, is presumptively entitled to back pay. . . . Since, at the same time, the initial burden is now placed on the individ-

> ual labor department employee to show that he is a member of the recognized class subject to employment discrimination, we think it is appropriate to offer some preliminary observations concerning the manner in which the presumption in favor of the class and the initial burden placed upon an individual employee may be reconciled by the district court.
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> "The district court's task will be further complicated since the only criteria which Goodyear previously imposed for transfer have been found by this court to be invalid under Title VII. If an employee can show that he was hired into the labor department before April 22, 1971 and was subsequently frozen into that department because of the discriminatory employment practices established here, then we think the individual discriminatee has met his initial burden of proof unless there are apparent countervailing factors present." *Id.* at 1379.

This holding is entirely consistent with, and flows from our decision in *Georgia Power* that the presumption in favor of a member of a class discriminated against does not *per se* entitle an employee to back pay without some individual clarification. 474 F.2d at 921-922.

This Court in *Goodyear*, then went on to detail the burden on the employer:

> ". . . It will be incumbent upon Goodyear to show by convincing evidence that other factors would have prevented his transfer regardless of the discriminatory employment practices. If Goodyear wishes to show that a labor department employee would not be qualified for any other job then its proof must be clear and convincing. Any doubts in proof should be resolved in favor of the discriminatee giving full and adequate consideration to applicable equitable principles." Id. at 1379, 1380.

There, just as in this case, our prior decision in Cooper v. Allen, *supra*, 467 F.2d at 840, was instructive. In *Cooper*, the district court had placed the burden on the plaintiff to show, disregarding the discriminatory testing, that he was the most

qualified for the job for which he was seeking back pay. This Court reversed:

> "On remand the City must prove by clear and convincing evidence that, in the light of the enumerated qualifications, Cooper would not have been entitled to the job even had there been no requirement to take and pass the Otis test. That is, the City must show that the person actually hired was on the whole better qualified for the job." *Id.* at 840.

Reading these earlier decisions together, it is clear that the burden of proof formulated by this Court conceives an initial lighter burden on the back pay claimant with a heavier weight of rebuttal on the employer. Therefore, the *maximum* burden that could be placed on the individual claimant in this case is to require a statement of his current position and pay rate, the jobs he was denied because of discrimination and their pay rates, a record of his employment history with the company and other evidence that qualified or would have qualified him for the denied positions, and an estimation of the amount of requested back pay. The employer's records, as well as the employer's aid, would be made available to the plaintiffs for this purpose. The burden then shifts to the company to challenge particular class members' entitlement to back pay.[147]

The method of calculating a class-wide back pay award must not be rigid. This results from the impossibility of calculating the precise amount of back pay. There is no way of determining which jobs the class members would have bid on and have obtained if discriminatory testing, seniority, posting and bidding system, and apprentice and on-the-job training programs had not been in existence. Class members outnumber

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[147]In Peters v. Missouri-Pacific Railroad Co., *supra*, 483 F.2d at 500, this Court stated:

> "The Railroad claims that the back pay damages awarded plaintiff Placide duplicate in part damages previously awarded him for loss of wages in an earlier suit against the Railroad for personal injuries suffered on the job. The burden was upon the Railroad to establish its plea of estoppel by the prior state judgment."

promotion vacancies; jobs have become available only over a period of time; the vacancies enjoy different pay rates; and a determination of who was entitled to the vacancy would have to be determined on a judgment of seniority and ability at that time. This process creates a quagmire of hypothetical judgments. Johnson v. Goodyear Tire and Rubber Co., *supra*, 491 F.2d at 1379.

It does not follow that back pay claims based on promotions cannot be awarded. Unrealistic exactitude is not required. This Court made this principle clear in Brennan v. City Stores, Inc., 479 F.2d 235, 242 (5th Cir. 1973), involving the Equal Pay Act:

> The defendant's objection to the formula used to compute back pay are numerous. . . . While the mechanics of computing back pay are difficult and alternative figures might have been used by the trial court in fashioning a remedy, whatever difficulty of ascertainment exists was due to the discriminatory wage structure maintained by the defendant. In such cases, it suffices for the trial court to determine the amount of back wages "as a matter of just and reasonable inference." Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-688, 66 S.Ct. 1187, 1192, 90 L.Ed. 1515 (1946). "Difficulty of ascertainment is no longer confused with right of recovery." Mitchell v. Mitchell Truck Line, Inc., 286 F.2d 721 at 725-726 (5th Cir. 1961) and Hodgson v. Ricky Fashions, Inc., 434 F.2d 1261 at 1262-1263 (5th Cir., 1970). Since no single wage scale could be ascertained for women or men at Loveman's, and because the formula used by the trial court was reasonably calculated to compensate the discriminatees for their losses, we decline to require a more precise calculation in this case. *Id.* at 242.

Likewise, in Bowe v. Colgate-Palmolive Co., *supra*, 416 F.2d 711, faced with the impossibility of determining the rate of pay of the plaintiffs because of the complexities of the job bidding procedure, the court ordered back pay awards at the maximum rate which the plaintiff could have earned. 416 F.2d at 721. Therefore, in computing a back pay award two principles are

lucid: (1) unrealistic exactitude is not required,[148] (2) uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer.[149] Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d at 1380, n. 53.

The method of computation will be a function of the complexity of the case. If the class is small, or the time period short, or the effect of the discrimination straightforward, a fairly precise determination of what each claimant's position would have been, *but for* the discrimination, is possible. This type of individual-by-individual determination was utilized in Bing v. Roadway Express, Inc., *supra*, 485 F.2d at 452-455. Initially the employer had the burden of notifying its black city drivers, in order to determine the members of the class, that some of their members had been discriminatorily excluded from road driving

[148]Bowe v. Palmolive Co., 489 F.2d 896, 902; Brennan v. City Stores, Inc., *supra*, 479 F.2d at 242 (Equal Pay Act case); Evans v. Sheraton Park Hotel, 5 EPD ¶ 8079 at 6922-23 (D.D.C.1972). *See* Back Pay, *supra* note 117, at 764-67 nn. 151, 152, 153; Cooper and Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. at 1634-35.

[149]Bowe v. Colgate-Palmolive Co., *supra*, 272 F.Supp. 332, 365-366 (S.D. Ind.1967), rev'd., 416 F.2d at 721 (Because preciseness in computing back pay was not possible, the district court awarded the minimum which could have been earned. The Court of Appeals reversed, ordering the maximum.); Evans v. Sheraton Park Hotel, *supra*, 5 EPD ¶ 8079 at 6922-23.

In back pay cases under the National Labor Relations Act, this Court has consistently resolved uncertainties against the wrongful employer rather than the injured employee. In NLRB v. International Union of Operating Engineers, Local 925, 460 F.2d 589, 599 (5th Cir. 1972), we summarized:

"Had Ross been on the job instead of Lucas, he might just as easily have been selected. We will never know for certain, but we think this uncertainty should be resolved against respondents and not against Ross. As this court had held in an analogous situation:

'when an employer's unlawful discrimination makes it impossible to determine whether * * * employee would have earned backpay in the absence of discrimination, the uncertainty should be resolved against against the employer.'

"NLRB v. Miami Coca-Cola Bottling Co., 5 Cir., 360 F.2d 569 at 572-573. See also East Texas Steel Casting Co., Inc., 116 NLRB 1336, 1339-1340 (1956), enforced NLRB v. East Texas Steel Castings Co., 5 Cir., 255 F.2d 284 (5 Cir. 1958)."

positions. Since there was only one type of job involved, the class was small, and the variables, back pay period and pay rate, readily definable; the court was able to take an individual-by-individual approach. Johnson v. Goodyear Tire & Rubber Co., *supra*, 491 F.2d 1364.

However, when the class size or the ambiguity of promotion or hiring practices or the multiple effects of discriminatory practices or the illegal practices continued over an extended period of time calls forth the quagmire of hypothetical judgment discussed earlier, a class-wide approach to the measure of back pay is necessitated.[150] It should be emphasized that this is not a choice between one approach more precise than another. Any method is simply a process of conjectures.[151] When a court

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[150]In *Georgia Power*, this Court was cognizable of these difficulties, and modified the language on burden of proof quoted above with the implication that a court should search for a more pragmatic method of calculation:

"The trial court's decision must also include a weighing of issues as to limitations and laches (discussed more fully below), factors of economic reality (*i. e.*, the relative expense of accurate determination of individual rights vis-a-vis the amounts involved) and, most assuredly, the physical and fiscal limitations of the court to properly grant and supervise relief. This listing is intended to be illustrative and not exhaustive. It is our intention to leave the issue altogether open for reconsideration and decision by the court below." 474 F.2d at 922.

Doubts about which individuals or whether all class members would have been promoted have called forth a class approach on remedial issues other than back pay. United States v. Bethlehem Steel Corp., *supra*, 446 F.2d at 660; United States v. Central Motors Lines, Inc., 338 F.Supp. 532, 560 (W.D.N.C.1971).

[151]The process of computation and burden of proof is not an "either, or" approach. In United States v. Wood, Wire & Metal Lathers International Union, Local 46, *supra*, 328 F.Supp. at 443-445, the court had found "substantially less than total exclusion of nonwhites" from job referrals by the union. In order to grant back pay the particular black workmen entitled had to be specified. An objective criteria was used:

". . . [A] claimant will be eligible for back pay in any month during which he either (a) shaped the hiring hall for five or more days or (b) shaped the hall and/or worked on a job or jobs for a total of eight or more days."

An individual claimant had to present some evidence that he qualified under these criteria. In order to determine the actual amount of back pay,

is faced with the employment situation like this case, where employees start at entry level jobs in a department and progress into a myriad of other positions and departments on the basis of seniority and ability over an extended period of time, exact reconstruction of each individual claimant's work history, as if discrimination had not occurred, is not only imprecise but impractical.[152]

Courts have reconciled, in a class-wide approach, the complexities in computing approximate pay rates and pay periods in several ways. In Stamps v. Detroit Edison Co., *supra*, 365 F.Supp. 87, the court had defined the class and determined the back pay period, as has been done here. In order to determine the pay rate of each member of the class who had been excluded from the jobs in the five pay groups containing the "skilled trades high opportunity jobs" the court averaged the five pay rates and awarded each claimant back pay based on this averaged rate computed for pay grade progression purposes according to the number of years of employment, less the amount of interim earnings.

Another method of computation can be categorized as a formula of comparability or representative employee earnings formula. Approximations are based on a group of employees, not injured by the discrimination, comparable in size, ability, and length of employment – such as "adjacent persons on the seniority list or the average job progress of persons with similar

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however, the court switched to a class-wide approach. The court utilized the average earnings of a comparable group of white union members for the period of discrimination.

[152]The key is to avoid both granting a windfall to the class at the employer's expense and the unfair exclusion of claimants by defining the class or the determinants of the amount too narrowly. For instance in this case, actually to assume that employee #242 would have been promoted in three years to such-and-such job instead of employee #354 is so speculative as to unfairly penalize employee #354. *See* Stamps v. Detroit Edison Co., *supra*, 365 F.Supp. at 121-122. Many district courts, realizing this problem, have ordered parties to negotiate an approach and determination of back pay. *E. g.*, United States v. Georgia Power, C.A. Nos. 12355, 11723, 12185 (N.D.Ga. Jan. 31, 1974); Johnson v. Goodyear Tire & Rubber Co., *supra*, 349 F.Supp. at 18.

seniority" – to the class of plaintiffs.[153] In Bowe v. Colgate-Palmolive Co., 489 F.2d 896 (7th Cir. 1973), involving a class of fifty-four women, the court approved this approach:

> In each case the problem was to determine in some reasonable fashion "the highest rate of pay for such jobs as [the employee] would have bid on and qualified for if a non-discriminatory seniority scheme would have been in existence." 416 F.2d at 721. As already observed, exact reconstruction of the work history of each employee had the system contained no discriminatory element is impossible. the district court chose a test period so as to determine on the basis of experience the jobs each employee would have performed in the absence of discrimination. The period selected was from March 9, 1970 through May 31, 1970, the twelve weeks beginning shortly after the preliminary injunction opening all jobs to women.
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> Women who obtained the better paid general labor jobs during the test period were awarded the difference between their actual pay for time since July 2, 1965 and an amount computed for the same period on the basis of their individual hourly rate during the test period, less adjustments for contractual increases.
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> *Id.* at 902.

Likewise, in United States v. Wood, Wire & Metal Lathers Int. Union, Local 46, *supra*, 328 F.Supp. at 443-445, where the court was computing the back pay of black lathers injured by a discriminatory union referral system, a "representative employee earnings formula" was employed:

> For any month of eligibility a claimant is to receive the difference, if any, between average earnings of white union members performing outside work . . . and permit holders [a non-union lather performing only outside work] on the one hand, and the lesser amount the claimant earned or should have earned. *Id.* at 444.

The Equal Employment Opportunity Commission urges a comparability formula for this case:

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[153]See Back Pay, *supra* note 117, at 764-67.

> While the appropriate formula should be decided by the Master after a hearing, this Court should instruct the Master that such formula should be based upon a class of whites which would be comparable to the members of the effective class but for the discrimination. By such a formula a determination of the gross award can be established without prohibitive expense within the physical and fiscal limitations of the Court. See, United States v. Georgia Power Co., *supra*, 5 FEP cases at p. 598. Brief for the United States EEOC as amicus curiae, at 47.[154]

While the district court is not limited to this particular alternative, it has more basis in reality (i. e. actual advancement of a comparable group not discriminated against) than an individual-by-individual approach.

Finally, the ingredients of back pay should include more than "straight salary." Interest, overtime, shift defferentials, and fringe benefits such as vacation and sick pay are among the items which should be included in back pay.[155] Adjustment to the pension plan for members of the class who retired during this time should also be considered on remand.[156]

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[154]In other words, the total award for the entire class would be determined. At that point, individual claims would be calculated on *pro rata* shares for those workers of similar ability and seniority claiming the same position, possibly eliminating the necessity of deciding which one of many employees would have obtained the position but for the discrimination. Claimants dissatisfied with their portion of the award could be allowed to opt out in order to prove that they were entitled to a larger portion. *Cf.* Fed.R.Civ.P. 23(d)(2); Protective Committee v. Anderson, 390 U.S. 414, 435, n. 17, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968).

[155]*See* Bowe v. Colgate-Palmolive, *supra* 489 F.2d at 903-904 (vacation, sick pay, and bonus); United States v. Georgia Power, *supra*, 474 F.2d at 922 (travel expenses); Schattman v. Texas Employment Commission, 330 F.Supp. 328 (W.D.Tex.1971), rev'd on other grounds, 459 F.2d 32 (5th Cir. 1972), cert. denied, 409 U.S. 1107, 93 S.Ct. 901, 34 L.Ed.2d 688 (1973) (sick and vacation leave); Pettway v. American Cast Iron Pipe Co., 332 F.Supp. 811 (N.D.Ala.1970) (holiday and vacation pay).

[156]Rosen v. Public Service Electric & Gas Co., *supra*, 477 F.2d 90, 95-96 (3rd Cir. 1973); United States v. Georgia Power Co., *supra*, C.A. Nos. 12355, 11723, 12185.

Conclusion

The declaratory and affirmative injunctive relief should alleviate the perpetuated effects of the company's intentional discrimination and testing and educational requirements. Back pay should compensate for economic losses suffered during the period of testing and before the implementation of this decision. Nevertheless, two additional elements of relief are necessary. The district court should establish a complaint procedure by which a member of the class may question the interpretation or implementation of the district court's decree. *See* United States v. Georgia Power, *supra*, C.A. Nos. 12355, 11723, 12185. The procedure should include the filing of a complaint with the personnel department of the company and the proper committee of the Board of Operatives (described *infra*). Finally, the district court should retain this case on the docket for a reasonable time to insure the continued implementation of equal employment opportunities.[158a] Brown v. Gaston County Dyeing Machine Co., *supra*, 457 F.2d at 1383; Parham v. Southwestern Bell Telephone Co., *supra*, 433 F.2d at 429.

IV. BOARD OF OPERATIVES

The appellants also appeal the relief granted by the district court in disestablishing the separate black employees management board, the Auxiliary Board, and integrating the all-white employee board, the Board of Operatives. For complete understanding of this issue, an explanation of the organization of the company, as established by Mr. John J. Eagan, its founder, is necessary.

[158a] We feel it particularly appropriate to call attention to the final decree in the three named *Georgia Power Co.* cases. Upon remand of this court, 474 F.2d 906, the district court permitted the parties to prepare a suitable means of effectuating the judgment of this Court. The resulting decree may well be a model for other trial courts to use with appropriate modifications in back pay cases.

A. *Plan of Employee Participation and Corporate Management*

The company was organized in 1922 under the "Eagan Plan," envisioning an ideal of cooperation between labor and management. The plan called for the control of business policies to be vested in a board of directors elected by the stockholders. A Board of Management, composed of corporate officers elected by the Board of Directors, conducted the day to day business of the company. The unique feature of the Eagan Plan was the Board of Operatives, composed of non-supervisory personnel elected by employees of the company. A main function of the Board of Operatives has been to advise the Board of Management on matters affecting the welfare of the employees and to provide a channel of communication between management and the employees.

During the lifetime of Eagan, candidates for election to the Board of Operatives had to be white males over twenty-one years of age, American citizens, and employed by the company in a non-supervisory capacity for three or more years. The racial restriction continued after Eagan's death. The district court found that Eagan had intended that result, although the codicil to his will did not by its terms restrict membership to whites.[157]

As an adjunct to the Board of Management and the Board of Operatives, an all black board of employees evolved to advise the other two boards on matters affecting the interest of the black employees. Voting and membership on the Board of Directors of the ACIPCO Colored YMCA and its successor, the Auxiliary Board, created in 1935, was restricted to black employees. The district court found that the Auxiliary Board would not have originated except for the racial restriction on the membership of the Board of Operatives.

From 1922 until January, 1970, the Board of Operatives and the Auxiliary Board functioned separately under the provisions

[157]All employees, without regard to race, were eligible to vote in the Board of Operatives elections.

of the Eagan Plan and the by-laws of the corporation. A codicil to Eagan's will had bequeathed all the outstanding common stock of the company to the members of the Board of Management and the members of the Board of Operatives, jointly, and to their successors in office. The Boards acted as trustees for the benefit of the employees and future employees of the company and their families. Similar status was not conferred on the members of the Auxiliary Board.

B. *Desegregation of the Employee Boards*

In finding the segregation of black and white employees into two boards illegal, the district court stated:

> However, the passage of Title VII of the Civil Rights Act of 1964 presents, in the judgment of this Court, a novel case of first impression. Assuming the propriety and lawfulness of the operation of the Eagan Plan at Acipco prior to July 2, 1965, the issue is presented concerning the effect on the Eagan Plan of the new and overriding legislative policy of Title VII which now controls the employment practices of all private corporations covered by the Act. Title VII now prohibits, in no uncertain terms, any discrimination by an employer with respect to compensation, terms, conditions or privileges of employment because of an individual's race or color. The Court believes that the right to serve as a member on the Board of Operatives at Acipco has been, since the inception of the Eagan Plan, a valuable term, condition, or privilege of employment at Acipco and therefore falls within the express coverage of Title VII, 42 U.S.C.A. § 2000e-2(a). 332 F.Supp. at 815.

The court then declared the racial restriction on membership on the Board of Operatives unlawful, but directed that it continue its functions, as a joint stockholder, co-trustee, and management advisor, representing *both* black and white employees with no racial restriction on its membership. The Auxiliary Board was ordered to be abolished simultaneously with the elimination of the racial restriction on the membership of the Board of Operatives. The district court, however, was conscious of the fact that the ratio of black employees to white employees was approximately one to two and that if voting

should polarize along racial lines no black employee would be elected to the Board of Operatives under the present electoral districts, established in 1959. Therefore, the court ordered the company to draw up new electoral districts. The court also added:

> As a caveat, the Court points out that the election district arrangement should not be drawn or gerrymandered for the purpose of either depriving or guaranteeing any employee of a particular race or color the right to serve on the Board of Operatives. This would be contrary not only to the spirit and letter of the original Eagan Plan and Trust, but also to the provisions of Title VII and the prevailing law. Such arrangement of election districts must be on genuine geographical, operational and functional grounds in the manner contemplated by the Eagan Plan so that employees throughout the plant will have the opportunity of electing fellow employees working in their own areas or districts to the Board of Operatives on a fair basis. 332 F.Supp. at 817.

The company submitted a plan which enlarged the number of electoral districts from five to twelve with one representative elected from each district. The district court approved this plan finding that the districts "had been organized and are based on genuine geographical, operational and functional grounds without any intention or purpose to gerrymander the districts because of racial considerations." 332 F.Supp. at 819. Black employees of the company have boycotted each election held subsequently because they consider the elections pursuant to the company's plan unfair and illegally constituted. The black employees now submit their objections to this plan to this Court on appeal. We affirm the district court's order.

Appellants maintain that the district court's order is inadequate to remedy the unlawful exclusion of black employees from this segment of the management structure. They point to the record of the racially discriminatory practices employed by the company under its all-white management. The district court's notation of the low ratio of black employees to white employees, which means less black votes, is claimed to be a

result of the practices condoned by the company's management which should not continue to penalize black employees. Second, appellants point out that a primary purpose of the Board of Operatives is to act as a channel of communication for employees. They postulate that 33% of the company's work force, all of the black employees, will go unrepresented if the clear majority of white employees is allowed to rule. Finally, in assuming that the Board of Operatives will have substantial responsibility in monitoring the compliance with Title VII, appellants challenge the *bona fides* of persons who have condoned and been the beneficiaries of the company's prior discriminatory practices. Appellants rely on Fifth Circuit precedent ordering equal black and white representation in elective offices and committees in merging previously segregated unions. *E. g.*, Long v. Georgia Kraft Co., *supra*, 455 F.2d 331; United States v. Jacksonville Terminal Co., *supra*, 451 F.2d at 457-458. Cumulative voting on a plant-wide basis and a two-thirds voting requirement for the Board of Operatives is requested.

The appellants' position has several strengths. The Board of Operatives, as co-trustees of the stock of the company, jointly, with the Board of Managers, elects the Board of Directors,[158] who are ultimately responsible for the company's policies and who elect the Board of Managers, the day to day operators of the company's business. The Board, therefore, shares the responsibility for the company's past employment practices. In addition, the Board of Operatives will be the main recipient of any complaints concerning compliance with the relief granted by the court. Therefore, input by black employees is vital. However, the district court has correctly applied the law in this case,[159] and we do not think it has abused its discretion in granting relief.

[158]The record clearly indicates that before the death of Mr. Eagan two of the members of the Board of Operatives were elected directly to the Board of Directors. The record, however, does not state whether this practice continued after the death of Mr. Eagan.

[159]The Equal Employment Opportunity Commission evidently determined that the company had violated 42 U.S.C.A. § 2000e-2 (a) by "maintaining a segregated Board of Operatives which performs the functions of

There is no racial gerrymandering claimed by the appellants.[160] Since the date of the district court's order, the number of black employees has increased to approximately 50% of the company's work force. In addition, in the first election after the district court's order, the statistics reveal that black employees were in a majority in three of the electoral districts and constituted a substantial percentage in two others.[161] To allow cumulative voting would defeat the valid company policy of alloting representation along geographical and functional lines. Cumulative voting would also result in at-large elections. Courts in the reapportionment area have frowned upon the use of at-large districts while endorsing single electoral districts. White v. Regester, 412 U.S. 755, 765-770, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971). Finally, at-large elections would encourage voter polarization by race. We are seeking to apply a law whose purpose is to resolve employment inequalities resulting from racial discrimination rather than emphasize race as an employment or voting criterion.

However, in affirming the order of the district court, we are mindful of the responsibility the Board of Operatives will bear in aiding the implementation of the affirmative relief that the trial court will order. To the extent possible with the procedure which the district court will direct on remand, we think it appropriate that a bi-racial committee of employees, operating as an agency of the Board of Operatives, be appointed to deal with this matter. *Cf.* Ellis v. Board of Public Instruction of Orange County, 423 F.2d 203, 206, n. 4 (5th Cir. 1970). The members of this committee should be drawn from the

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a labor organization and may not be segregated under the Civil Rights Act of 1964." The district court did not reach this issue (332 F.Supp. at 815 n. 3), nor do we.

[160] *Cf.* Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944) (racial gerrymandering and unfair representation by the white majority of the firemen's union).

[161] The data indicates that in these other two districts plus three more, eligible black voters outnumbered the total votes received by the successful candidate because of the light turnout for voting.

ranks of the Board of Operatives and the Equal Employment Opportunity Committee. The committee would be available to receive employee complaints and aid in compliance with Title VII. It could report both to the Board of Operatives and to the district court, so long as it retains jurisdiction, on equal employment problems.

The judgment is reversed and the case is remanded to the trial court for further proceedings not inconsistent with this opinion.

BELL, Circuit Judge (specially concurring):

I concur in the result reached in the extended majority opinion to the extent that the result relates to the errors assigned. The result is in accord with the previous decisions of the Supreme Court and of this Court and is, with respect to each assignment of error, consonant and well within the interstices which the courts have been called upon to fill in administering Title VII, and in giving effect to the remedial aim of Congress which was expressed in enacting Title VII.

I do not join in those advisory portions of the opinion (pp. 260-264) [A-77 to A-84], having to do with determining back pay for the class. I prefer to wait for a concrete case involving an award of back pay before deciding whether the suggested approaches are valid in law. They may or may not be employed. Damage awards must be individualized to avoid constitutional problems which would arise in taking the property of one for another without a showing of loss to the particular recipient. This would not, of course, preclude a settlement by consent decree on terms suitable to the parties and which do not overreach the members of the class. The Georgia Power Company order referred to in Fn. 156(a) of the majority opinion is an example of such a consent decree.

I do not perceive the holding of the majority as going beyond what the court said in Johnson v. Goodyear Tire & Rubber Company, 5 Cir. 1974, 491 F.2d 1364. There the court held that each member of the class, black employees hired before April 22, 1971, had been the victim of discriminatory testing

and diploma requirements and transfer policies. The court placed the burden on those claiming back pay to establish membership in the class. The burden was then to shift to the employer to show that the particular claimant would never have transferred regardless of the discriminatory employment practices. The court went on to say:

> "Our holding does not necessarily mean that every member of the class is entitled to back pay. Individual circumstances vary and not all members of the class are automatically entitled to recovery. There should be a separate determination on an individual basis as to who is entitled to recovery and the amount of such recovery. It is clear that all members of the class have been subject to unlawful racial discriminatory practices. Therefore, those who have suffered a loss of pay because of such practices are entitled to appropriate compensation. . . ."

The *ratio decidendi* of *Goodyear* avoids the constitutional problem which would inhere in an approach, for example, of comparing the total remuneration of one class with that of another class, e. g., black employees versus white, for the period of discrimination and simply allocating the difference amongst the class suffering the discrimination regardless of individual financial loss.

The controlling principle for determining back pay here is set out on the majority opinion at page 259 [A-77]. The principle stated does not conflict with the burden of proof rule of *Goodyear* but is a more definitive statement of the same principle and gives greater assurance of individualizing each claim. The majority statement is as follows:

> ". . . the *maximum* burden that could be placed on the individual claimant in this case is to require a statement of his current position and pay rate, the jobs he was denied because of discrimination and their pay rates, a record of his employment history with the company and other evidence that qualified or would have qualified him for the denied positions, and an estimation of the amount of requested back pay. The employer's records, as well as the employer's aid, would be made available to the plaintiffs

for this purpose. The burden then shifts to the company to challenge particular class members' entitlement to back pay."

APPENDIX B

Opinion of U.S. Court of Appeals, 5th Cir., dated July 24, 1978 ("*Pettway* IV")

Rush PETTWAY et al., Plaintiffs-Appellants,

v.

AMERICAN CAST IRON PIPE COMPANY, a corporation, Defendant-Appellee.

No. 75-4219.

United States Court of Appeals, Fifth Circuit.
July 24, 1978.

Rehearing and Rehearing En Banc Denied
Feb. 11, 1978.

Black employees of a pipe manufacturer brought a class action for employment discrimination under Title VII of the 1964 Civil Rights Act and under the Civil Rights Act of 1866. The United States District Court for the Northern District of Alabama, at Birmingham, Seybourn H. Lynne, J., following remand from the Court of Appeals, 494 F.2d 211, approved a proposed settlement and entered an order overruling all motions by dissatisfied class members, and an appeal was taken. The Court of Appeals, Goldberg, Circuit Judge, held, inter alia, that: (1) the injunctive relief portion of the district court's decree and the denial of back pay to class members employed subsequent to July 2, 1965, the effective date of the 1964 Civil Rights Act, had to be considered as the court's own judgment, but the back pay award to the subclass was to be treated as a consent settlement; (2) the class representative should have been allowed to prosecute, on behalf of the class, an appeal of the injunctive relief and denial of back pay portions of the district court's decree, considering, inter alia, that a substantial portion of the class supported an appeal on the issue of injunctive relief, and that an appeal from the denial of back pay was obviously in the best interests of the 1,400 class members who were excluded from the back pay subclass; (3) the district court's approval of the back pay settlement constituted an abuse of discretion, where the active named plaintiffs unanimously disapproved of the settlement, and 70% of the subclass also

objected, and (4) the ability of subclass members to opt into the back pay settlement could not be terminated before a final determination of the propriety of that settlement was made.

Affirmed in part, reversed in part, and remanded.

Appeal from the United States District Court for the Northern District of Alabama.

Before GOLDBERG, AINSWORTH and FAY, Circuit Judges.

GOLDBERG, Circuit Judge:

This complex class action employment discrimination suit, now before us for the fourth time, illustrates the difficulties inherent in judicial efforts to remedy violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, by undoing the effects of past racial discrimination in employment. Complaints alleging racial discrimination in employment were first filed with the Equal Employment Opportunity Commission on November 22, 1965.[1] Suit was brought on May 13, 1966 under Title VII and 42 U.S.C. § 1981, and the class was certified pursuant to Federal Rules of Civil Procedure 23 (b) (2).

The complaint was dismissed by the district court on March 10, 1967 on the ground that the EEOC had failed to attempt conciliation prior to initiation of the court action. On appeal with several other actions, we reversed. *Dent v. St. Louis-San Francisco Railway Co.*, 406 F.2d 399 (5th Cir. 1969). During the pendency of that first appeal, the defendant, American Cast Iron Pipe Company (hereinafter "ACIPCO") discharged one of the named plaintiffs. That plaintiff then sought and was denied relief in the district court. We again reversed, directing reinstatement and back pay. *Pettway and Wrenn v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969).

[1]The Equal Employment Opportunity Commission, the agency established by Congress to administer, interpret, and enforce Title VII, filed a brief as amicus curiae in support of the plaintiffs-appellants. The Commission stated in its brief that "the issues of procedural safeguards to class members and the scope of relief necessary to eliminate employment discrimination are of general importance in the interpretation and administration of [Title VII]."

The district court then addressed itself to the plaintiffs' substantive charges. In 1970 the court examined the racial composition of the Board of Operatives, an advisory board composed of non-supervisory personnel elected by employees of the company. In 1922 the founder of ACIPCO, John J. Eagan, had bequeathed all the outstanding common stock of the company to the members of Board of Operatives and the Board of Management, a body composed of corporate officials elected by the Board of Directors to conduct the day to day business of the company, and their successors in office. The Boards acted as trustees for the benefit of the present and future employees of the company. From 1922 until January, 1970 the membership of the Board of Operatives was explicitly limited to "white" employees. Blacks were relegated to the Auxiliary Board, which was created to advise the other two boards on matters affecting the interests of black employees. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974). In 1970 the district court ordered the integration of the Board of Operatives and the abolition of the all-black Auxiliary Board. *Pettway v. American Cast Iron Pipe Co.*, 332 F.Supp. 811 (N.D. Ala. 1970), *aff'd* 494 F.2d 211, 264-67 (5th Cir. 1974).

The employee discrimination charges were tried in October 1971. The district court found that certain testing conducted by the company had an adverse impact on the employment opportunities of black employees and did not pass muster under *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971). Nevertheless, the court denied all requested relief except attorneys' fees and costs. On appeal, we again reversed the district court, and to guide the court on remand, we examined the governing law in a lengthy and detailed opinion. We instructed the court to order back pay to compensate class members for wages lost due to past discrimination and to formulate injunctive relief particularized to the circumstances of the case but as broad in scope as necessary to ensure black employees the opportunity to reach positions in the company previously denied to them by discriminatory practices. *Pettway v.*

American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) (hereinafter cited as *"Pettway III"*).

On remand the district court encouraged the litigants to engage in settlement negotiations directed toward the fashioning of a decree to carry out the mandate of *Pettway III*. The district judge played an active role in the extensive negotiations which followed. It remains unclear precisely what was resolved during these negotiations. In any event, on May 14, 1975 the court, over the plaintiffs' objections, issued a decree ordering injunctive relief and back pay. On June 12, 1975, after further negotiations concentrating primarily on the issue of back pay, the court issued its final judgment awarding one million dollars to a subclass composed of 841 members (the "back pay subclass")[2] of the 2242 person class.[3] The June 12 judgment also

[2]The June 12 final judgment provided that the one million dollar award be divided among the subclass members according to an allocation formula. Following that judgment, the company mailed a back pay check to each individual awardee. The court's November 20 final order provided a mechanism for subclass members to opt into or out of the settlement. Those desiring to opt into the settlement could do so by cashing their checks prior to December 15, 1975. Claimants who were dissatisfied with their award and chose not to cash their checks by that date were considered to have opted out. Their awards were deemed "null and void," and these claimants were relegated by the court's final order to independent back pay actions. For a detailed discussion of the court's opt-in, opt-out procedure, see subsection V(B) *infra*.

[3]The present class comprises 2242 members. Of these, 841 (the "awardees") are also members of the back pay subclass and were sent checks following the June judgment. *See* footnote 2 *supra*. 399 members of the subclass cashed the proffered checks, while 442 declined to do so. The remaining 1401 members of the class were denied any back pay award under the terms of the district courts' May 14 decree.

The parties are in agreement that 661 members of the class (the "objectors") filed objections to the June judgment by signing the June 20, 1975 motion for reconsideration which indicated intent to appeal all aspects of the court's order. The litigants also agree that 147 of these objectors were awardees who cashed the proffered back pay checks. The parties disagree as to the composition of the remainder of the objector group. Appellants and the EEOC urge that all the objectors are members of the back pay subclass; the company maintains that 150 of the remaining objectors were excluded from the back pay subclass. We do not view this dispute as decisive of any issue in this appeal and are content, in light of our resolution of the case, to accept the company's statistics. Accord-

effected a few minor modifications in some of the injunctive provisions of the May 14 decree.

On June 13, 1975 the active named plaintiffs[4] and a number of other class members requested that class attorney Oscar W.

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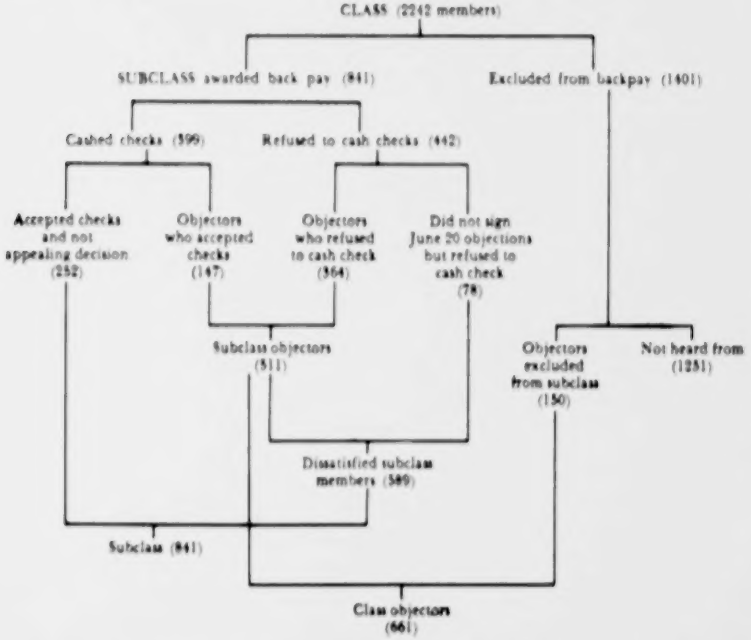
ingly, we find that a total of 511 of the objectors (661-150) are members of the back pay subclass, 147 of whom cashed their back pay checks and 364 (511-147) of whom did not. In addition to these 511 subclass members who objected to the court's decree by signing the notice of appeal, another 78 (442-364) subclass members, while not signing the notice of appeal, manifested their dissatisfaction with at least the back pay award by refusing to cash their back pay checks. Thus, a total of 589 (511 + 78) members of the 841 person subclass expressed their dissatisfaction with the back pay award either in writing or by opting out of the subclass. The figures are set forth below in schematic form:



[4]This class action was originally brought by four named individual plaintiffs—Rush Pettway, Davis Jordan, Alex Fitts, and Peter Wrenn. Three of these class representatives attended the June 13 meeting and later signed the notice of appeal. The fourth, Peter Wrenn, is no longer employed by the defendant and has not been active in the case for

Adams, Jr. appeal the decree and judgment. Mr. Adams informed these class members that he did not intend to appeal. Robert L. Wiggins, Jr., then was retained to file objections to the decree and to prosecute an appeal. On September 5, 1975, the district court denied a motion by appellants to substitute Mr. Wiggins as class counsel and on November 20, entered its final order overruling all motions by the dissatisfied class members. This appeal followed.

The length of litigation in complex Title VII class actions often rivals that of even the most notorious antitrust cases. In the instant case, we encounter another judicial paleolithic museum piece. Last year this court, speaking in retrospect but proving to be prophetic as well, cited *Pettway III* as an example of the time and expense which must be incurred "before the dust of combat has finally settled" in employment discrimination class actions. *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). Little did we then realize that we were dealing with atomic fallout rather than mere dust. At the beginning of our 57 page opinion in *Pettway III* we stated, perhaps naively, that

> Although the path of this law suit is strewn with the corpses of intermediate decisions, the posture of the present case on appeal will hopefully allow final resolution. In order to accomplish this the opinion must unfortunately be long and complex.

494 F.2d at 216 (footnote omitted). As is now evident, the fallout continues to radiate, and our earlier optimism regarding the disposition of this case has mutated to less hopeful emotions. Nonetheless, we are undaunted by the crushing weight of accumulated record and remain mindful that the Court must not diverge from the direction chartered for us by the Title VII compass, no matter how long and difficult the journey. We, thus, address ourselves to the fourth appearance of this

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several years. The terms "class representatives" and "named plaintiffs" will be used throughout the opinion to refer to Pettway, Jordan, and Fitts, the three active named plaintiffs.

case, determined to ensure that the victims of illegal racial discrimination receive the full measure of relief which the law accords them.

Our burden is eased considerably by the thorough and scholarly opinion written by Judge Tuttle in the prior appeal. Except where subsequent cases further elucidate our prior holding or provide necessary qualifications, we have been able to adopt the factual and legal conclusions reached in *Pettway III* without the need for an extensive review of previously considered authorities. Even so, our task will require an opinion of a magnitude similar to Judge Tuttle's opus.

This case presents a multitude of issues. On the one hand, we are asked to address fundamental questions at the heart of class action jurisprudence, such as the appealability of class action judgments by dissatisfied class members, the standards for settlement approval in the face of widespread dissent from the class, and the choice of the appropriate decision-maker to act on behalf of the class. We are also asked to resolve highly technical questions concerning specific affirmative modifications of present plant operating practices. Appellants' primary contentions on appeal are that the injunctive relieve portions of the judgment below are inadequate to effectuate our mandate in *Pettway III*, that the district court erred in denying back pay to over 1400 class members, and that the back pay settlement on behalf of the subclass was inadequate and improperly approved by the court. Before reaching these issues, however, we must consider defendant's contention that appellants lack "standing" to appeal the district court's decree. Because our analysis of both appealability and the substantive issues depends in part on whether the decree should be considered a settlement or the court's own judgment, a question upon which there is vehement disagreement, we turn first to an examination of the proceedings below which culminated in the district court's November 20, 1975 final order.

I. *Settlement or the Court's Own Judgment — Entering the Twilight Zone*

The role of an appellate court in reviewing a decree in a class action suit varies greatly depending on whether the decree was reached through a settlement by the litigants or whether the decree represents the judgment of the court. *Compare Cotton v. Hinton*, 559 F.2d 1326, 1330-31 (5th Cir. 1977) (settlement); *Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976) (settlement); *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846-51 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976) (settlement); *and Newman v. Stein*, 464 F.2d 689, 692-93 (2d Cir. 1972) (Friendly, J.) (settlement); *with Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (judgment); *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976) (judgment); *United States v. United States Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975) (judgment); *Rogers v. International Paper Co.*, 510 F.2d 1340 (8th Cir. 1975), *vacated on other grounds*, 423 U.S. 809, 96 S.Ct. 19, 46 L.Ed.2d 29 (1975) (judgment) *and Head v. Timiken Roller Bearing Co.*, 486 F.2d 870, 875-77 (6th Cir. 1973) (judgment). These differing modes of review reflect a recognition of the different character of the two types of judicial resolution. The standard of review appropriate to a court judgment is premised on the requirement that the trial judge, following adversary presentation of the facts and law, exercise his *independent* judgment on each of the issues presented for decision. His ruling must be based on findings of fact supported by evidence in the record and on conclusions of law. The role of the trial court in arriving at an independent judgment closely parallels its more traditional role in the non-class action context. Consequently, review of class action judgments is patterned after the conventional modes of review. The appellate court can review the trial court's findings of fact to ensure that they are supported by the record and are not clearly erroneous, while giving ap-

propriate deference to the trial judge's superior ability to assess demeanor and credibility. The reviewing court is also particularly well suited to make an independent assessment of the law as applied to the facts, again giving deference to the lower court where the law affords some measure of latitude and discretion.

Different problems are posed by class action settlements. Lacking a fully developed evidentiary record, both the trial court and the appellate court would be incapable of making the independent assessment of the facts and law required in the adjudicatory context. Moreover, a definitive judicial determination of the facts and law would be inappropriate because compromise of legal rights is intrinsic to the settlement process. Because of the limited control exercised by any particular class member over the decision to engage in these compromises, however, the settlement process is more susceptible than adversarial adjudications to certain types of abuse. The interests of lawyer and class may diverge, as may the interest of different members of the class, and certain interests may be wrongfully compromised, betrayed, or "sold out" without drawing the attention of the court. For this reason, in addition to requiring that the trial court evaluate whether a class action settlement is "fair, adequate and reasonable and is not the product of collusion between the parties", *Cotton v. Hinton*, *supra*, 559 F.2d at 1330, the law accords special protections, primarily procedural in nature, to individual class members whose interests may be compromised in the settlement process. These protections include notice, ensuring that class members know when their rights are being compromised, and an opportunity to voice objections to the settlement.

We recognize that this net dichotomy is in some respects over-simple. In the class action context, some of the abuses generally associated with settlements may insinuate themselves into litigation resulting in the court's own judgment. For example, in framing litigation strategy in a complex suit the class attorney and named plaintiffs might concentrate on relief for certain members of the class while ignoring the interests of others. Nevertheless, because the potential for abuse is much

greater when class actions are resolved through a settlement, the procedural protections applicable to settlements are not utilized in the judgment context.[5]

Courts have not often been required to examine the nuances of the distinction between a settlement and a court's own judgment. The nature of the lower court's decree is usually obvious as a factual matter and not subject to dispute by the parties. That is decidedly not the case here. The litigants before us dispute almost every factual or quasi-legal element in the case, and the classification of the district court's order as a settlement or judgment is no exception. We are thus faced with the novel issue of determining whether the lower court's order, as it relates to injunctive relief, the scope of the back pay subclass, and the size of the back pay award, constitutes a consent decree or the judgment of the district court.

Appellants maintain that both the injunctive relief and back pay awards resulted from a settlement between ACIPCO and Mr. Adams, the original class attorney. If this characterization is accepted, appellants could then argue that the procedures prerequisite to acceptance of the settlement by the district court were not followed below and that the district court therefore abused its discretion in approving the consent decree.[6] The district court's order could then be reversed on this "procedural" ground without necessitating a review of the substantive elements of the order.

The defendant, on the other hand, argues that the entire order of the district court constitutes the court's own judgment, in which event appellants were not entitled to the procedural safeguards prerequisite to judicial acceptance of a class action settlement. The court's order then could be reversed only if

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[5]This is not to say, however, that courts should not be conscious of the possibility of similar abuses in the judgment context. See discussion in the introduction of section III, *infra*.

[6]The procedural requirements for approving a settlement and the scope of the district court's discretion in this area are major issues in this litigation and are discussed at length in section V *infra*.

the district court applied an improper legal standard or misapplied the correct standards.

Our careful examination of the record reveals that the district court's order is not susceptible to easy or uniform characterization. Settlements and court judgments are distinguished not by different platonic essences, but by the processes of their creation. Thus in order to resolve the dilemma posed by the litigants, it is necessary to consider the process by which the district court reached its final order of November 20, 1975.

A. *Brief History*

Following remand from this court's decision in *Pettway III*, the district judge met with counsel in chambers on July 11, 1974 and directed the parties to fashion an appropriate decree. On August 19, 1974 the defendant submitted to both Mr. Adams and the court a proposed decree covering both back pay and injunctive relief. The plaintiffs filed objections to the proposed injunctive relief order and submitted a counter-proposal for back pay. After negotiations between the parties, the defendant filed a revised proposal, including an augmented back pay offer of $560,000 to the back pay subclass. The plaintiffs did not accept either the proffered injunctive relief or back pay settlement offer. Further negotiations failed to resolve this impasse, and on May 14, 1975 the court entered its May decree. This decree substantially adopted defendant's revised proposal as to injunctive relief but, in an apparent attempt to satisfy the plaintiffs' objections to the back pay award, ordered the company to utilize a modified method of calculation to compute the award for the back pay subclass.[7] This method of calculation resulted in a total back pay award of $907,222.18, to be

[7]The district court's decree adopted the company's position limiting the back pay subclass to black employees hired prior to July 2, 1965 (the effective date of the Act) who were presently employed by the company or who left the company subsequent to July 2, 1965 with at least one year of company service. This order excluded 1400 class members from consideration for a back pay award and established a back pay subclass consisting of 841 individuals, including a number of persons no longer employed by the company.

divided among members of the subclass according to a distribution formula.

On May 23, 1975 the plaintiffs filed a motion for reconsideration, objecting to the injunctive relief provisions of the decree, the exclusion from the back pay subclass of 1400 class members, and the amount of the back pay award. After an in-chambers conference with the parties, the district court overruled plaintiffs' objections to the affirmative relief provisions of the decree and to the court's exclusion of 1400 employees from the back pay subclass, but revised both the back pay distribution formula and the method for determining the size of the back pay award. A few minor changes were also made in some of the departmental lines of progression previously adopted by the court.[8] All of these changes were embodied in a judgment dated June 12, 1975. Calculations based on the June 12 judgment resulted in a total back pay award of $1,000,000. The court also awarded plaintiffs' counsel $220,000 in attorney's fees.

The court's final order and modified judgment of November 20, 1975 essentially restated the provisions of the June 12 judgment with the addition of findings of fact and conclusions of law. The November 20 final order also provided dissenting subclass members with the opportunity to opt-out of the back pay award. *See* footnote 2 *supra*.

B. *Injunctive Relief*

Our review of the record and this procedural history compels the conclusion that the injunctive relief provisions of the de-

[8]These modifications in the lines of progression were made at the request of ACIPCO, which argued that they were necessary "in order to reflect certain changes in job titles and in operations and to afford additional promotional opportunities consistent with the efficiency and safety of the operations." (A 1042). The record does not indicate that attorney Adams ever agreed to these changes. In fact, they were accepted by the court on June 12, 1975, the same day that the plaintiffs' May 23 motion for reconsideration was overruled. The modifications were not made in response to objections by the class, and, in any event, relevant to only a small portion of the injunctive provisions.

cree constituted the court's own judgment. The district judge indicated his own view concerning the proper characterizations of this portion of the decree during a hearing held on October 30, 1975.[9] In the course of that hearing, Judge Lynne stated:

> [T]he judgment of this Court entered on May the 14th granting the affirmative relief mandated by the Fifth Circuit *was my judgment*. I was aided in its formulation by the arguments, extensive arguments of counsel, but that is my final judgment implementing the decree of the Fifth Circuit. (emphasis supplied).

The record fully supports this characterization by Judge Lynne. Mr. Adams repeatedly objected to the injunctive relief provisions of the order and at no time consented to defendant's proposed decree on injunctive relief. Nor did the district court modify any of the injunctive provisions in response to plaintiffs' objections. *See* footnote 8 *supra*. Appellants and the EEOC argue that Mr. Adams concentrated on back pay in his negotiations with the company and that as a practical matter the injunctive provisions were based on compromise and settlement. We find nothing in the record that supports this conclusion. Moreover, it can hardly be inferred from the fact that Mr. Adams concentrated on back pay during the negotiations that he consented to the injunctive relief provisions.

Our conclusion is not changed by anything found in a stipulation entered into by Mr. Adams and counsel for the defendant.[10] The stipulation relates an off-the-record statement made

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[9]On September 5, 1975 the court held a hearing in chambers on appellants' motion to substitute counsel. The court denied this motion, but allowed attorney Wiggins "to represent the disaffected employees as amicus curiae." (A 430) The court also stated its intention to conduct "an evidentiary hearing which will disclose the manner in which the final decree of this court was arrived at." (A 430) The October 30 hearing was held for this purpose.

[10]Between the September 5 hearing in chambers and the October 30 evidentiary hearing, Judge Lynne instructed Mr. Adams and counsel for the company to prepare a stipulation setting forth the events leading up to the May decree and the June judgment. The court admitted the stipulation into the record during the October 30 hearing, stating that it

by Mr. Adams to the court to the effect that while the May decree and the June final judgment did not contain every provision sought by the plaintiffs, they "constituted a good decree . . . and the judgment should be given an opportunity to work. . . ." Mr. Adams therefore concluded that he would not appeal from the decree. The EEOC argues that this stipulation reveals that the injunctive relief provisions resulted from compromise between the parties. We cannot agree. We perceive a significant distinction between an after-the-fact conclusion that a court's judgment is essentially satisfactory and, all things considered, does not justify an appeal, and a before-the-fact consent to the precise terms of defendant's proposed decree. Nothing in the stipulation indicates that Mr. Adams did more than acquiesce in the court's final order after it became apparent that the court would not consider further objections. In the context of this litigation, this may more aptly be characterized as resignation to the inevitable then consent to a settlement. While the arguments of appellants and the EEOC may indicate the potential dangers of less than avid advocacy even in the context of a court judgment, they do not shake our firm conclusion that the injunctive relief portions of the decree represent the court's own judgment, rather than a settlement between the parties, and must be treated accordingly.

C. *Defining the Back Pay Subclass*

The district court's May 14 decree excluded all blacks hired by ACIPCO subsequent to July 2, 1965 from the back pay subclass. As a result, 1400 of the 2241 employees in the class were precluded from receiving any award of back pay. *See* note 3 *supra*. Despite repeated objections by Mr. Adams to the exclusion of class members from the back pay subclass, the court refused to reconsider its decision. We find no suggestion in the record that Mr. Adams ever agreed to the exclusion of 1400 class members from a share of the back pay award. In the No-

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"accurately summarized" the events culminating in the final order by the district court.

vember 20 final order, the court acknowledged that the definition of the subclass was the court's own judgment:

> [T]he Court finds from the evidence and concludes that no black employee employed subsequent to July 2, 1965 has suffered any economic loss due to the Company's testing and educational requirements or from any other alleged discriminatory practice. (A 415)

We therefore conclude that the exclusion of 1400 class members from the back pay subclass was the court's own judgment and not part of any settlement by the litigants.

D. *The Amount of the Back Pay Award*

The district court's final order of November 20, 1975 provided for the distribution of $1,000,000 to the members of the back pay subclass. If the injunctive relief and subclass determinations resisted facile classification, the manner in which the back pay determination was made defies virtually any traditional characterization. Typically, class action settlements are reached by the parties, who draft a consent decree which is submitted to the trial judge for approval. The court's role is generally limited to mediating disputes and offering suggestions. Indeed, we have recently stated that while the court in reviewing a settlement may make suggestions for modifications of the proposed decree, it may not unilaterally change the decree. Approval of the parties' settlement must be either given or withheld. *See Cotton v. Hinton, supra,* 559 F.2d at 1331. *See also Flinn v. FMC Corp., supra,* 528 F.2d at 1173-74.

The events leading to the final back pay award in this case do not conform to this model. An examination limited to the court's May decree and June judgment might suggest that the award was the court's own judgment. While changes in the back pay formula resulting in increases in the total amount of the award were made in response to plaintiffs' objections to both the defendants' back pay offer and the courts' May decree, it was the trial judge, rather than the defendant, who determined the amount of the June award. As the court stated in

its June judgment when describing its role in resolving the back pay issue:

> The Court has carefully examined the varying contentions of the parties, has adopted some elements of each, and has determined therefrom that. . . .
>
> [the court then described the final back pay judgment] (A 183)

Thus it is clear that the court did not merely accept or reject a proposed settlement.

Nonetheless, the record reveals that the size of the back pay award was determined in a process of negotiation and that the final award was determined with the consent of plaintiffs counsel. The impression that the back pay award was the court's own judgment results in part because there exists no record of the numerous conferences held between the parties and Judge Lynne on the back pay issue. Judge Lynne's own pronouncements on the question reveal that the final $1,000,000 back pay figure in the November order was arrived at through some sort of agreement by the parties. For example, at the September 5 hearing on substitution of counsel Judge Lynne stated:

> A study was made by the company which indicated to my satisfaction that there were at least three hundred employees who were not entitled to anything.[11] We went over that study very carefully. The obligation of the company for back pay as disclosed by a very careful analysis was in the neighborhood of $650,000 or $680,000, somewhere along that line. . . . *After many conferences* in which I expressed the opinion that a formula should be devised so that every black employee in the class would get some back-pay award, *eventually we came to the amount involved of a million dollars.* (A 989) (emphasis supplied).

At the October 30 hearing, which was held for the purpose of receiving evidence on the process by which the May and June judgments were formulated, the court reiterated this view.

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[11]In fact, the district court's order provided that 1400 class members were not entitled to back pay.

After stating that injunctive relief constituted the court's own judgment, Judge Lynne noted:

> The matter stands somewhat differently with respect to the back pay award. Back pay award resulted from continuous negotiations. (A 1043)
>
> . . . . .
>
> I am aware of the fact, of course, that there are members of the class who are dissatisfied with every aspect of this final judgment. That's almost inescapable where human beings are involved, and particularly with the award of *back pay at which the Court arrived with the agreement of counsel.* (A 1044). (emphasis supplied).[12]

Finally, the district judge in his November 20 final order concluded that "the individual back pay awards were arrived at through negotiations between the parties at the urging of the Court and are *in the nature of a consent settlement. . . .*" (A 417) (emphasis supplied).

We are thus faced with a situation in which the events leading to the back pay award do not coincide with the paradigmatic class action settlement, yet plaintiffs' counsel did in fact agree to the amount of the final award. In this context it is virtually impossible to distinguish meaningfully between a process in which each party finally acceded to a figure chosen by the trial judge[13] and one in which the parties themselves came

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[12]Judge Lynne further stated on October 31 that:

Taking into consideration all of the factors involved, I felt like that every black employee of ACIPCO should receive something, and that is how the negotiations proceeded to *final solution by negotiation.*

If I didn't think that the back pay award was all that could be gotten through negotiations, and I must say that I spent many, many hours in an effort to promote the negotiations . . . and we inched up from $500,000 to the ultimate figure beyond which ACIPCO was not willing to go on the basis of its calculations, and that's the way things came out. These things, negotiations of that nature to arrive at a lump sum figure cannot obviously be conducted in a courtroom. (A 1188). (emphasis supplied).

[13]The stipulation by Mr. Adams and defendant states that before the June judgment was entered "counsel for both parties indicated to the Court that while the proposed back pay award did not conform to their

to an agreement which was then adopted by the court in its final order. Any such distinction is especially tenuous where, as here, the trial judge has been authorized to participate in the settlement negotiations. *See Pettway III, supra,* 494 F.2d at 258.

In these circumstances, the trial court's characterization of its back pay decree as "in the nature of" a consent settlement marks the extent of the progress we can achieve in our definitional inquiry with any sense of confidence. Recognizing the hybrid nature of the decree, we find it necessary to abandon any further attempt to pigeonhole or classify it, and look instead to the functional considerations underlying the distinctive treatment of settlements and judgments. Under this functional approach, the question becomes whether this decree is more appropriately treated, for purposes of judicial review, as a settlement, requiring certain procedural protections for members of the class, or as the court's own judgment, in which case our evaluation must focus not on the procedural protections, but on the factual and legal bases for the award. We look for guidance to those factors counselling in favor of procedural protections for class members in traditional settlements and counselling against a paradigmatic judgment.[14]

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respective initial proposals, the award as directed by the Court was deemed fair and reasonable under all the circumstances and that therefore neither counsel would take an appeal therefrom." (A 417)

[14]We note that at least one of our sister circuits has gone behind the traditional labels to examine the realities of a settlement-judgment dispute. As the Seventh Circuit recognized in *EEOC v. United Air Lines,* 560 F.2d 224 (7th Cir. 1977), situations may arise in which a decree is properly treated as an adjudicated judgment with respect to one party and as a consent decree with respect to another party. In that case, after a proposed consent agreement was submitted to the trial judge one of the union defendants objected to a seniority provision in the decree. The district court nonetheless entered the decree, but crossed out the word "consent" on the first page. The Seventh Circuit commented:

> Judge Will's decision with respect to the Union was an adjudicated decision on the merits and not a mere consent decree. However, the decision remains a consent decree vis-a-vis United.

560 F.2d at 229 n. 7.

Examining the decree in the context of this appeal by members of the back pay subclass, it becomes clear that we must treat Judge Lynne's order as a consent decree. First, we note that each of Judge Lynne's orders represented an attempt to satisfy specific objections advanced by Mr. Adams with respect to prior formulations for determining the size of the back pay award. The trial judge, in essence, was *negotiating with the class.* These negotiations culminated, prior to the June 12 judgment, in Mr. Adams' consent to the $1,000,000 proposal. At least from the viewpoint of the class, the decree was in fact reached by agreement. Such an agreement, which perhaps embodied compromises of class rights, calls for the procedural protections normally associated with class action settlements. To allow a class attorney to compromise the rights of class members without providing these protections would be inconsistent with the policies of Rule 23(e).

Equally important, the statements of the trial judge quoted above reveal that Judge Lynne viewed the order as a consent decree reached through a process of negotiation. The record does not indicate that the final back pay award resulted from the district court's own valuation of the economic loss to the back pay subclass resulting from the defendants' discriminatory practices as measured by the standards set out in *Pettway III.* To the contrary, Judge Lynne's own pronouncements demonstrate that the award was viewed by the court as a compromise between the parties.[15] Thus the substantive protections normal-

[15]The court's findings of fact and conclusions of law incorporated in the November 20 final order further illustrate the court's treatment of the back pay award as a settlement. Conspicuously absent from the court's findings are any factual or legal conclusions necessary to support an independent back pay judgment. Instead, the court couched its findings in language more appropriate to evaluating a settlement. For example, the court concluded that awardees "*may have suffered some* economic loss due to alleged discriminatory practices of the company." (emphasis supplied). The total back pay award was deemed "a *reasonable* approximation" of the aggregate economic loss "which *may have been* suffered" by the subclass, and the individual back pay awards were deemed "to be fair, equitable and adequate." (emphasis supplied) (A 416). This language closely parallels the legal requirement that in approving a settle-

ly present in an adjudicated judgment, including the judge's independent determination of facts and law, were not present here. The district court in framing an adjudicated judgment must determine the full measure of damages to which the class is entitled as a matter of law. Under these circumstances in which the district court did not purport to make such a determination, we cannot treat the award as the court's judgment, and must instead treat it as a consent decree vis-a-vis the class.

In sum, we have determined that the injunctive relief portions of the decree and the denial of back pay to class members employed subsequent to July 2, 1965 must be considered as the court's own judgment. The back pay award to the subclass shall be treated as a consent settlement.

II. *Appealability*

The company argues vigorously that appellants are procedurally disqualified from raising each of their points of error on this appeal. First, ACIPCO alleges that Mr. Wiggins has never been certified as class counsel and thus may not appeal on behalf of the class the injunctive portions of the decree or the decision to exclude 1400 class members from the subclass. The company also alleges that each of the individual appellants either lacks standing to challenge the back pay settlement on appeal or has yet to receive an appealable final judgment as to back pay. Before addressing these contentions, however, it is necessary to outline briefly the chronology of events leading to this appeal.

A. *Background*

On June 13, 1975, the day after the court entered its June judgment, the three active named class representatives and at least twenty-eight of the thirty elected representatives of the

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ment, the trial court must evaluate whether the compromise is "fair, adequate and reasonable." *See Cotton v. Hinton, supra,* 559 F.2d at 1330; *Young v. Katz,* 447 F.2d 431, 432 33 (5th Cir. 1971).

Committee for Equal Job Opportunity[16] met with the class counsel, Mr. Adams, and requested that he appeal the court's judgment. Mr. Adams stated his intention not to appeal the judgment,[17] but indicated that the individual plaintiffs were free to consult other counsel for purposes of retaining separate representation and prosecuting an appeal. On June 20, 1975, 661 class members filed objections to the decree, and on June 22 these plaintiffs retained Mr. Wiggins as counsel. On September 5 the district court denied appellants' motion to substitute Mr. Wiggins as class counsel; motions requesting discovery and further evidentiary hearings were denied in the court's November 20 final order. This appeal followed.

B. *Injunctive Relief and Exclusion from the Back Pay Subclass*

We consider first the appealability of the district court's judgment as to both injunctive relief and the denial of back pay to 1400 class members. The defendant argues that appellants may not upset the court's judgment binding the class because they are appealing solely in their individual capacities and not as a class.[18] Appellants respond that Mr. Adams ceased to adequate-

[16]The Committee for Equal Job Opportunity is an organization of black employees at ACIPCO which was formed to represent minority employees in litigation against the company. We noted in *Pettway III* that this "intense organization of black employees" was formed by the majority of the affected class in 1965. *Pettway III*, *supra*, 494 F.2d at 233 and n. 53. The Committee is the designated representative of the majority of the class for purposes of this litigation.

[17]Later, in a letter to all class members dated July 22, 1975, Mr. Adams explained:

> Our position has been, and remains, that we have obtained for you the best Decree possible under all the circumstances involved in your case—one that can be used to end discrimination and can be adjusted to deal with the problems as they arise. We will *not* appeal, because an appeal may delay rights already obtained and could cause a loss of some of the back pay you have obtained . . . To win the appeal would only send it back to the District Court, where we are now.

[18]In view of our conclusion that appellants properly bring this appeal on behalf of the class, we need not consider what appellate rights would accrue to a member of the class appealing the court's judgment in his individual capacity.

ly represent the class when he refused to appeal those portions of the order which we have concluded were the court's own judgment. They urge this court to find that the district court abused its discretion in denying appellants' motion to substitute class counsel for purposes of this appeal, that appellants' counsel, Mr. Wiggins, serves as attorney for the class on this appeal, and that this appeal on behalf of the class is therefore properly before the court.

We are not aware of any cases in which the named class representatives and a large portion of the class desired to prosecute an appeal of a district court's judgment, yet the class attorney refused to do so. The issue before us is thus one of first impression, raising difficult and perplexing questions regarding the appropriate decision-maker on behalf of the class. While the "class" itself clearly has standing to appeal a judgment of the district court, *see, e. g., Pettway III, supra; James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), it is far from clear who may make the final determination of whether the "class" should appeal when the desirability of an appeal is at issue. In the instant case the class attorney, Mr. Adams, concluded that an appeal would not be in the best interests of the class. Mr. Adams stated on the record that he believed the decree to be a fair one and that an appeal would only delay implementation of the rights already obtained by the plaintiffs. On the other hand, the three active class representatives, the Committee for Equal Job Opportunity, and a sizable portion of the class itself believed that the decree did not adequately vindicate the interests of the class and that an appeal was warranted.

In the context of individual-plaintiff litigation the roles of the attorney and the client are well defined. The A.B.A. Code of Professional Responsibility envisions the attorney as an advocate of the interests of the client. American Bar Ass'n, Code of Professional Responsibility, EC 7-1 [hereinafter cited as ABA Code]. Although the lawyer has some freedom to make tactical choices during litigation without consulting his client,

the lawyer is expected to defer to the client's wishes on major litigation decisions. *See* ABA Code EC 7-1, EC 7-7, EC 7-9. Unfortunately, it remains unclear whether this model can be carried over to the class action context, as no clear concept of the allocation of decision-making responsibility between the attorney and the class members has yet emerged. *See generally* Developments in the Law — Class Actions, 89 Harv. L. Rev. 1318, 1578 (1976). Certainly it is inappropriate to import the traditional understanding of the attorney-client relationship into the class action context by simply substituting the named plaintiffs as the client. The interests of the named plaintiffs and those of other class members may diverge, and a core requirement for preventing abuse of the class action device is some means of ensuring that the interests and rights of each class member receive consideration by the court. Were the class attorney to treat the named plaintiff as the exclusive client, the interests of other class members might go unnoticed and unrepresented. *See Gonzales v. Cassidy*, 474 F.2d 67, 69-71, 76 (5th Cir. 1973); Developments in the Law, Class Actions, 89 Harv. L. Rev. 1318, 1592-95 (1976). Thus, when a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow decisions on behalf of the class to rest exclusively with the named plaintiffs. In such a situation, the attorney's duty to the class requires him to point out conflicts to the court so that the court may take appropriate steps to protect the interests of absentee class members.

This does not mean, however, that the class attorney may ignore the wishes of the class representatives in making fundamental litigation decisions. As one court has stated, "An attorney who prosecutes a class action with unfettered discretion becomes, in fact, the representative of the class. This is an unacceptable situation because of the possible conflicts of interest involved." *Leib v. 20th Century Corp.*, 61 F.R.D. 592 (M.D. Pa. 1974). In the context of a shareholders' derivative action, *Saylor v. Lindsley*, 456 F.2d 896 (2nd Cir. 1972), Judge Friendly has stressed that courts should not "accept the view that the attorney for the plaintiff is the *dominus litis* and the plaintiff

only a key to the courthouse door dispensable once entry has been effected":

> There can be no blinking at the fact that the interests of the plaintiff in a stockholder's derivative suit and of his attorney are by no means congruent. While, in a general sense, both are interested in maximizing the recovery this is only a half-truth. Even apart from special considerations which . . . may cause divergence of interest in cases where extremely large amounts are at stake, there is a difference in every case. The plaintiff's financial interest is in his share of the total recovery less what may be awarded to counsel, simpliciter; counsel's financial interest is in the amount of the award to him less the time and effort needed to produce it. A relatively small settlement may well produce an allowance bearing a higher ratio to the cost of the work than a much larger recovery obtained only after extensive discovery, a long trial and appeal. We say this not in criticism but in simple recognition of the facts of class action life.

456 F.2d at 900-01. The same considerations may cause a class attorney who has been awarded a substantial fee by the court to conclude that an appeal of the court's judgment might result in personally unremunerative litigation or a substantial and undesirable delay in the receipt of the fee award. When the possibility that counsel's own fervor may have been exhausted by an apparently endless legal battle is added to the equation, the potential conflict between the interests of the class and those of its attorney in an appeal cannot be ignored.

It is, therefore, clear that the decision to appeal cannot rest entirely with either the named plaintiffs or with class counsel. Nonetheless, the Rule 23(a)(4) requirement that the trial court determine whether "the representative parties will fairly and adequately protect the interests of the class" contemplates that the named plaintiffs will undertake a major role in the prosecution of a class action. The requirement also provides an important guarantee of a coincidence of interest between the named plaintiffs and the class.

We considered the scope of Rule 23(a)(4) and the proper role of the class representatives in deciding whether to appeal

from a class action judgment in *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973). Gonzales was a class member in a prior class action in which only the class representative, Gaytan, was awarded both retrospective monetary relief and prospective injunctive relief. The other members of the class, including Gonzales, were granted only prospective relief. No appeal was taken. Gonzales subsequently brought a second class action raising identical issues against the same defendant, who sought to raise res judicata as a bar to relief. We rejected the defendant's res judicata defense, finding that Gaytan's failure to appeal the earlier judgment constituted inadequate representation of the class. We stressed throughout the *Gonzales* opinion that it was the class representative's duty to appeal the lower court's judgment and thus it was the *class representative* who inadequately represented the class. Implicit in our discussion and holding in *Gonzales* was the conviction that, at least under the circumstances of that case, the class plaintiff and not the class attorney, was responsible for deciding whether to appeal.

The foregoing considerations convince us that, at least as an initial matter, the decision to appeal a class action judgment must rest with the class plaintiffs. If in making that decision the class plaintiffs arguably fail to adequately represent the interests of the class, the class attorney should point out potential inadequacies or conflicts of interest to the trial judge. Where the named plaintiffs wish to appeal, but the class attorney concludes that an appeal is not in the best interest of the class, the district court must exercise its discretion in deciding whether to substitute class counsel to allow the named plaintiffs to maintain the appeal on behalf of the class.[19] The proper ex-

[19]Distinctive problems may be presented where the named plaintiffs refuse to undertake an appeal which the class attorney believes to be in the best interests of the class or where both the named plaintiffs and the class attorney decide not to appeal. If no appeal is taken and the failure to pursue an appeal constitutes inadequate representation, other members of the class may certainly pursue relief in a collateral proceeding. *Gonzales v. Cassidy, supra.* Whether, and how, a direct appeal may be taken absent the participation of the original named plaintiffs, or the participation of both the named plaintiffs and the class attorney, are issues we need not resolve for purposes of this appeal.

ercise of the district court's discretion will depend on the facts and circumstances of each case. Among the factors that should be considered by the court are (1) the adequacy of representation of the named plaintiffs, including any apparent or potential conflicts of interest they might have with the remainder of the class, (2) the extent to which other class members support or oppose the appeal, and the extent to which an appeal may be necessary to protect the interests of absent class members, (3) the adequacy of representation provided by the class attorney and any conflicts of interest between the class attorney and the class, and (4) the reasonableness of the decision to appeal, including an assessment of the possibility of success on the merits.

Applying these principles to the instant case, we conclude that the class representatives should have been allowed to prosecute this appeal on behalf of the class. The trial court abused its discretion in denying appellants' motion to substitute class counsel for purposes of appealing the court's judgment.

First, we note that the class representatives have provided excellent representation on behalf of the class during the ten years of this litigation. The named plaintiffs, through the representative Committee for Equal Job Opportunity, have held monthly meetings and distributed news letters to keep the class informed of the progress of the case. There is undisputed testimony in the record that at an early stage of the settlement negotiations, the named plaintiffs rejected offers of special back pay compensation to the most active class members, themselves included, and demanded equal consideration for all members of the class. (A 1163-65). Throughout the entire course of this litigation, including the post-judgment period, not a single class member has objected to the representation provided by the named plaintiffs. Nor has any class member objected to the prosecution of this appeal. The only potential conflict between the interests of the class representatives and those of other class members arose when all three class representatives were awarded relatively sizeable shares of the back pay award, while many class members received no back pay. This potential conflict

disappeared, however, when all three active named plaintiffs rejected their back pay award and chose to prosecute this appeal.

We also find noteworthy the extent to which individual class members have demonstrated their interest in, and support for, this appeal. We reiterate that the sentiment of the class is but one factor in our analysis of the appealability question. Insofar as relevant, this is a factual question for which we necessarily must draw inferences from the sparse information contained in the record. Nonetheless, we find that the record clearly indicates a deep-seated and widespread dissatisfaction with the injunctive provisions of the decree. Among the 841 members of the subclass awarded back pay, 511 signed the June 20, 1975 objections to the decree and notice of intent to appeal. These objections focused on the injunctive portions of the decree in great detail. An additional 78 members of the subclass refused to accept the back pay award.[20] Thus 589 members of the 841 person subclass indicated dissatisfaction with the court's judgment. *See* footnote 3 *supra*.[21] While only 150 of the 1400 class members who were excluded from the back pay subclass explicitly objected to the injunctive portions of the decree by signing the June 20 objections, the record indicates that many individuals in this group received no notification of the judgment and had no opportunity to object either to their exclusion from the subclass or to the injunctive provisions of the decree.[22]

[20]The district court presumably was aware of the fact that a substantial portion of the subclass had not cashed their back pay check at the time of the October 30 hearing, because its November 20 final order extended the deadline for opting into the subclass until December 15, 1975.

[21]We recognize that some of the subclass members who refused to cash their back pay check may have objected only to the back pay award and not to the injunctive portions of the decree. However, all 511 awardees who signed the June 20 notice indicating an intent to appeal explicitly objected to the injunction portions of the decree. The record indicates that many awardees who refused to cash their back pay check did so in part because they feared that opting into the settlement would preclude appellate review of the injunctive provisions of the decree as well. Under the circumstances, it is clear that a substantial majority of the subclass favored this appeal of the injunctive portions of the decree.

[22]On May 21, 1975 a copy of the May decree and an explanatory letter were mailed by the company to all class members then employed by

Moreover, according to appellants' figures which are not contested by ACIPCO, over 1000 of the 2242 class members were no longer employed by ACIPCO in 1975. These members of the class did not have a personal stake in the injunctive provisions of the decree and could not be expected to object to allegedly inadequate injunctive relief. When due consideration is given to these factors, along with the widespread objections to the injunctive portions of the decree raised by the subclass members and the failure of a single class member to object to the representation provided by the named plaintiffs or their decision to prosecute this appeal, we find that a substantial portion of the class supported this appeal on the issue of injunctive relief.

Furthermore, there can be no doubt that an appeal from the denial of back pay is in the best interests of the 1400 class members who were excluded from the subclass. *Gonzales v. Cassidy, supra*, compels the conclusion that the class plaintiffs, in order to satisfy their duty to adequately represent the class, must appeal this portion of the court's order. As we noted in *Gonzales*:

> Gaytan [the class representative], through his attorney, vigorously represented the class until he obtained individual relief [for himself only]. The problem is that he was representing approximately 150,000 persons, who, although having had their licenses and registration receipts suspended without due process, were denied any relief by the three-judge court's prospective only application of its decision. *So long as an appeal from this decision could not be characterized as patently meritless or frivolous, Gayton should have prosecuted an appeal.* Otherwise, it cannot be

ACIPCO. According to figures proffered by appellants, over 1000 class members were no longer employed by ACIPCO in 1975 and thus did not receive this information. This letter constitutes the only notification of the court's decree sent by ACIPCO to those class members who were excluded from the subclass. While no Rule 23(e) "notice" is required for those portions of the decree which constitute the court's own judgment, and thus as a procedural matter we are not concerned with the "notice" received by those excluded from the subclass, the familiarity of this portion of the class with the injunctive portions of the court's May decree and June judgment is highly relevant in assessing the class' support for this appeal.

> said that he vigorously and tenaciously protected the interests of the class he was purporting to represent, or that all members of the class had been afforded due process of law by having a full day in court. It is axiomatic that an appeal is a significant element in the judicial process. Gaytan's failure to prosecute an appeal deprived the members of his class, whose rights were not vindicated by the three-judge court's decision, of full participation in this process.

474 F.2d at 76 (emphasis supplied). Likewise, the class members excluded from the subclass were denied any back pay relief to compensate for past discrimination by the company. As our discussion in section IV *infra* reveals, an appeal from this decision could hardly be characterized as patently meritless or frivolous.[23] On the basis of *Gonzales* alone the district court should have granted the motion to substitute counsel for the purpose of appealing this portion of the decree.

Finally, we note that an appeal on the issue of injunctive relief can hardly be deemed frivolous. The trial judge was well aware of the complexity of the legal and factual issues involved and the prior history of this litigation.[24]

In conclusion, we hold that under the circumstances of this case the trial judge abused his discretion by not granting appellants' motion to substitute class counsel for purposes of appealing the court's judgment. The decision to appeal rested as

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[23]Throughout the period between the May and November orders Mr. Adams repeatedly objected to the exclusion of 1400 class members from the back pay subclass. We must assume, therefore, that he believed that there was some merit to the contention that these class members were entitled to back pay.

[24]Nothing that we have said thus far is meant to criticize the representation of Mr. Adams during the ten years in which he vigorously litigated the plaintiffs' claims. We have previously had occasion to remark upon Mr. Adams' experience in representing plaintiffs in class action suits, *Cotton v. Hinton*, 559 F.2d 1326, 1332 and n.5 (5th Cir. 1977), and have no reason to discredit the sincerity of his belief that an appeal was not in the best interests of the class. Whether this belief was sincere or insincere, however, is not at issue here. The real question is whether, under the circumstances of this case, the district court should have let Mr. Adams' decision prevent appellants from appealing on behalf of the class by denying permission to substitute counsel.

an initial matter with the named plaintiffs. These representatives chose to appeal, and an analysis of the factors considered above demonstrates that their choice should have been honored. The named plaintiffs have provided excellent representation in the past, and there is no indication in the record that their decision to appeal was based on any considerations other than the interests of the class. The decision received widespread support among the class. With regard to those who were denied back pay, there can be no doubt that an appeal is necessary to effectuate their legal rights. While we do not question the sincerity of Mr. Adams' belief that an appeal of the injunctive decree is not in the class' interest, nothing in the record convinces us that the named plaintiffs' conclusion on this question was unreasonable. *See* section III *infra*. Finally, the issues raised on appeal are neither frivolous nor insubstantial. We therefore shall treat this appeal of the injunctive relief and denial of back pay portions of the district court's decree as an appeal on behalf of the class.

C. *Back Pay Award to the Subclass: Appealability of the Settlement*

In subsection I(D) *supra* we determined that the award of back pay to the subclass must be treated as a settlement. It is well settled that dissenters to a class action settlement may retain new counsel to appeal the district court's approval of a consent decree. *See Cotton v. Hinton*, 559 F.2d 1326, 1329 (5th Cir. 1977); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 (4th Cir. 1975), *cert. denied*, 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976). The company poses the rather ingenious argument that notwithstanding this general rule, none of the appellants in this case has "standing" to appeal the back pay settlement. First, the company argues that those members of the back pay subclass who failed to cash their back pay checks may not appeal the district court's approval of the settlement because under the terms of the court's November 20 final order, they have opted out of the subclass and have yet to receive an appealable final judgment as to back pay. The company then argues that

those appellants who accepted their back pay award by cashing the company's check did so under the express condition that acceptance of back pay constituted a release of any claims of discrimination,[25] and those appellants therefore have waived their right to maintain this appeal. Finally, the company maintains that those appellants who were excluded from the back pay subclass have no standing to contest on appeal the adequacy of the back pay award received by others. Therefore, according to the company, individual appellants either lack standing to appeal, have waived their right to appeal, or are not the subjects of an appealable final back pay judgment.

We agree with the defendant that appellants who were excluded from the subclass and denied back pay lack standing to contest the adequacy of the awards received by other class members. However, we conclude that the decree does constitute an appealable final judgment for those awardees who opted out of the settlement by refusing to cash their back pay checks. We also find that awardees who cashed their checks pursuant to the district court's opt-in, opt-out scheme did not waive their right to appeal the back pay settlement.

It is clear that the district court's November 20 final order constitutes a final decision within the meaning of 28 U.S.C. § 1291.[26] The order was intended to end the litigation on the merits and leave nothing for the court to do but execute judgment. *Catlin v. United States*, 324 U.S. 229, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945). *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

ACIPCO incorrectly asserts that the district court's order does not constitute a final judgment because the order provided subclass members who opted out of the subclass an opportunity to pursue individual damage claims in this lawsuit. We read the order to require subclass members who opted out of

[25]The portion of the decree pertaining to this release is reproduced in footnote 78 *infra*.

[26]Section 1291 provides that "the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

the subclass to pursue their damage claims in separate, independent lawsuits. In *Pettway III* we stated that the district court could allow claimants who were dissatisfied with their pro rata share of a class-wide back pay award to opt-out of the back pay subclass and demonstrate that they were entitled to a larger award. 494 F.2d at 263 and n. 154. The district court properly attempted to utilize this opt-out device. In the notice to all subclass members who had not yet cashed their back pay checks, mailed by the company at the court's direction on November 21, 1975, the court advised that back pay awards would become "null and void" as to all awardees who failed to cash their check prior to December 15, 1975. *See* November 20 Final Order and Modified Judgment, A. 418. The court's notice continued:

> "[Y]ou will have the right thereafter to bring an independent action against the Company . . . and the Company will have the right to assert . . . [defenses] as if there had never been the entry of the back pay in your favor *in the Pettway case*." (A 418) (emphasis supplied).

In the November 20 final order the court explained that a claimant who opted out of the settlement would have the right to pursue an independent action "free of the *defense of res judicata or collateral estoppel* insofar as his individual back pay claim is concerned." (A 417) (emphasis supplied). This language, together with the fact that the court did not afford awardees who declined to cash their back pay checks any opportunity to prove their individual damages in the proceedings of *this* suit, convinces us that the district court contemplated that its November final order would be the final adjudication in this suit of the rights of dissatisfied subclass members. Consequently, the court's order represents a final decision within the meaning of 28 U.S.C. § 1291.[27]

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[27]The instant class suit was originally certified as a Rule 23(b)(2) action. As we demonstrate in subsection V(B)(1) *infra*, in Rule 23(b)(2) class actions the district court may not require members of the back pay subclass to either accept their award or opt-out of the class suit altogether. At most, awardees may be permitted to opt-out of a subclass, while re-

We also find that those claimants who cashed their back pay checks may appeal from the lower court's approval of the settlement notwithstanding the fact that the waiver form they signed in cashing their checks could be construed as a waiver of their right to appeal.[28] Rule 23 recognizes that many small claimants frequently have no litigable claim unless aggregated in a class suit. Because of the cost and difficulty of proving individual damages, *see Pettway III, supra*, 494 F.2d at 258-63, even the opportunity to prove individual damages in the same litigation often will not be an adequate substitute for participation in an acceptable settlement. Without the right to appeal approval of a settlement prior to the expiration of the option period, dissatisfied claimants could be faced with the equally unpalatable alternatives of opting into a settlement which should not have been approved or undertaking the burdens of individual actions. *See Ace Heating & Plumbing Co.*, 453 F.2d 30, at 32-33 (3rd Cir. 1971). Requiring claimants to opt into a back pay subclass before they have an opportunity to seek appellate review of the settlement would be inconsistent with design of Rule 23(e), which bounds the court's discretion in approving proposed settlements. Subclass members have an interest in ensuring that a settlement is reviewed by the district court in conformity with settled legal standards, and we will not allow subversion of the protections afforded by Rule 23(e) by requiring claimants to opt-out of a settlement in order to obtain appellate review.

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maining in the class to pursue their individual claims in the same suit. *See Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721, 736 (5th Cir. 1976); *United States v. United States Steel Corp.*, 520 F.2d 1043, 1057 (5th Cir. 1975); *La Chappelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 n. 7 (5th Cir. 1975). This is precisely the result we intended in *Pettway III*. *See* subsection V(B)(1) *infra*. Thus the district court's order should have allowed awardees who opted out of the subclass to pursue their damage claims in further proceedings in this suit. This fact, however, does not make the court's order any less a final judgment. Indeed, in *Cotton v. Hinton, supra*, this court reviewed a settlement which included back pay provisions even though individual back pay awards were yet to be determined. *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

[28] *See* footnote 78 *infra*.

To protect the rights of claimants to participate in a valid settlement, we conclude that the option of subclass members to opt into a back pay settlement may not be cut off before a final determination of the propriety of that settlement is made. *See* subsection V (B) (2) *infra; cf. Ace Heating & Plumbing Co. v. Crane Co., supra.* Because the district court improperly terminated the option to opt into the settlement before this appeal could be completed, thereby imposing upon the subclass members the impermissible choice of opting into what may be an unacceptable settlement or opting out of the subclass and undertaking the burdens of proving individual claims, we conclude that any waiver of appellate rights by those claimants who opted into the subclass is invalid.

Thus each of the appellants who were members of the back pay subclass may appeal from the district court's approval of the back pay settlement. Having already held that the appeal of the injunctive relief and denial of back pay portions of the district court's judgment has been brought on behalf of the class, we conclude that each of the substantive issues raised by appellants is properly before us. With both a sense of relief for having finally resolved the thorny procedural issues in the case and apprehension at what lurks ahead, we now turn to appellants' substantive claims.

III. *Injunctive Relief*

Having concluded in section I, *supra,* that the injunctive relief portions of the district court's decree constituted the court's own judgment, we now reach appellants' contention that Judge Lynne failed to follow our mandate in *Pettway III* in devising affirmative relief for class members. Our discussion is unavoidably complex, and we find it necessary to reverse the district court on a number of points. Underlying many of our determinations with respect to the injunctive portions of the decree are the complex and technical problems inherent in judicial attempts to remedy past employment discrimination by restructuring the multi-faceted employment practices of a large indus-

trial concern. To a large extent, our own difficulties with the decree stem from the method by which Judge Lynne attempted to resolve these problems. We do not criticize Judge Lynne for attempting to utilize informal techniques of conciliation. We know from long experience the limitations and frustrations inherent in grappling with these problems using traditional litigative methods. We are not so bold or naive as to suggest that these complexities would dissolve if remedial responsibilities in the employment discrimination area were entrusted to an alternative institutional decision-making body, and recognize in any case that Congress has placed on the courts a responsibility to give effect to its policies of equal and non-discriminatory treatment for minorities in the employment area, as in other phases of our national life. In carrying out our responsibilities, we must and do remain alert to the possibility of utilizing innovative techniques of conciliation and problem solving. Many of our recent opinions in the Title VII area recognize the desirability of encouraging settlement among the contesting parties, particularly with respect to required modifications of plant employment and promotion practices. *See, e. g., Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). We further recognize that the courts can sometimes best facilitate these conciliation efforts by utilizing informal techniques. We do not suggest here that conciliation efforts be forced into a Procrustean bed of on-the-record hearings.

Sometimes, however, settlement efforts do not achieve fruition. In these instances the trial court must alter its role and adjudicate the dispute among the parties. Such an adjudication, particularly in the context of class action litigation, presents a series of conundrums for both trial and appellate courts. Much of the information and evidence necessary to frame an adjudicated decree may be known to the district court through its participation in settlement negotiations, but will not be reflected on the record. Thus, the evidentiary support for the district court's ultimate decision will not be apparent to a re-

viewing court unless steps are taken to develop a satisfactory record. Evidentiary hearings and the submission of exhibits into the record may sometimes appear redundant and inefficient from the perspectives of the parties and the district court, but they are indispensable for purposes of conscientious appellate review. This court cannot properly review a district court's findings and conclusions without examining the supporting evidence. *Tasby v. Estes*, 572 F.2d 1010 (5th Cir. 1978).

The fundamental problem facing us in our task today is the absence of an adequately developed factual record. Following our remand in *Pettway III*, the district court encouraged settlement negotiations in informal proceedings held off the record. No trial or evidentiary hearing was held. As a result, almost no evidence was added to the record subsequent to our decision in *Pettway III*. We do not criticize the district court's attempt to resolve this dispute through informal procedures. When it became clear, however, that settlement negotiations would not bear fruit, it was incumbent on the court to base its conclusions on evidence in the record. Instead, numerous conclusions of the district court rest on factual predicates without evidentiary support in the record. ACIPCO represents that the district court considered evidence in chambers which supported these findings and conclusions, but we have no way of judging whether this is correct or whether the "evidence" which may have been examined by the district court actually supports its conclusions. The learned and experienced judge who tried this case may conscientiously, logically, and intelligently have come to the conclusion that his judgment was correct. There may have been rivers of evidence coursing through the chambers of the district judge. But without that evidence available to us on the record, we are unable to gauge the depth of those rivers or assess its navigability as a route to the district judge's conclusions. Other conclusions of the district court rest on evidence already assessed in our prior opinion and found insufficient to support some of the legal conclusions now drawn therefrom. In light of our clear mandate in *Pettway III*, this

evidence standing alone simply cannot be the basis for legal conclusions already rejected by our prior opinion.

The company's failure to present evidence on the record in support of its position may be due in part to the failure of all the parties to distinguish clearly those portions of the decree which were resolved by settlement from those which were adjudicated by the court. It is likely that some portions of the injunctive decree actually were reached through the agreement of both ACIPCO and attorney Adams. Nevertheless, the decree represents the court's own judgment. *See* subsection I (B) *supra*. If it were clear precisely which portions of the injunctive decree were reached through agreement of counsel, we could treat those sections of the decree as a settlement and require the Rule 23 procedural safeguards discussed in subsection V (A), *infra*. As has been the case with regard to most of the factual issues raised by this appeal, however, the record is silent on this question. In any event, the district court did not draw such a distinction among portions of the injunctive decree or provide class members the requisite procedural safeguards with regard to those sections, if any, which it considered the parties to have accepted. Under the circumstances, we must require full evidentiary support for each element in the injunctive decree. Otherwise, the participants to the negotiations could compromise the legal rights of the class members free from both the procedural strictures of Rule 23 and the appellate court's review of the substantive legal requirements for framing injunctive relief.

In summary, we must reverse the district court where it misapprehended the purport of our prior mandate or where its conclusions are not supported by evidence in the record. This appeal presents multiple manifestations of ACIPCO's failure to supplement the record and of the district court's failure to base its conclusions on evidence in the record. That the errors below may flow from a single source does not, however, relieve us of the responsibility to consider and address each legal issue properly raised by appellants.

A. *Two Decades of ACIPCO History*

Our extensive opinion in *Pettway III* discusses at length the organization of the company, 494 F.2d at 217-18, its employment practices through 1974, *id.* at 218-222, and the present discriminatory effect of these practices necessitating affirmative relief. *Id.* at 222-43. While we need not repeat that discussion here, it is necessary at the outset to summarize briefly the factual and legal conclusions relevant to our disposition of the issues raised on this appeal. We shall then examine the standards outlined in *Pettway III* for framing affirmative relief, the district court's injunctive decree on remand, and appellants' allegations that the decree does not comply with our prior mandate.

1. Prologue: Company Organization

The company's operations are organized into various departments. The five primary production departments include the monocast department, the fittings foundry, the steel foundry, the melting department, and the steel pipe foundry. The machine shop performs some additional labor on items produced by the production departments and provides replacement maintenance on all machinery. The company also has seven service departments consisting of the general yards, central stores, shipping, electrical, maintenance, inspection, and construction departments. The responsibilities of these departments include the receipt of raw materials, the shipment of finished products, and the performance of various maintenance functions. The company's highly-skilled craft positions are concentrated in the electrical, maintenance, and inspection departments and in the machine shop. These four craft departments and the steel pipe foundry have historically contained very low percentages of black employees.[39]

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[39] In 1971 36% of the ACIPCO's 2514 employees were black, yet only 9% of the employees in the maintenance department, 11% in the machine shop, 5% in the electrical department, and 3% in the inspection and the steel pipe departments were black.

Prior to our 1974 decision in *Pettway III*, the method of advancement within all of ACIPCO's departments involved a wage progression schedule consisting of 15 pay groups. As of the date of the 1971 trial below, over 95% of the company's black employees worked in pay groups 1-8. Only 30% of ACIPCO's white employees held these lower paying positions. Advancement up the pay group ladder was based on departmental seniority. Until 1971, the company did not have a systematic written procedure for filling vacancies. Promotions within a department went to the senior department employee in the pay group immediately below the vacancy, with advancement within pay groups 9-15 subject to illegal testing requirements. The company discouraged transfers between different departments. *Id.* at 223 n. 27. In 1971 the company adopted a new procedure for filling vacancies in positions above pay group 3. First job vacancies were posted for three days within the department. If qualified bids were received, a selection was made on the basis of departmental seniority and ability. If no qualified bids were received from within the department, vacancies were posted plant wide and filled on the basis of plant-wide seniority. An employee transferring from another department did not carry over any of his accumulated seniority for purposes of seniority within the new department. *Id.* at 223.

2. Our Evaluation of ACIPCO's Employment Practices in Pettway III

Until 1961 ACIPCO maintained a formal policy of segregating employees by race. While this policy was discontinued after the promulgation of Presidential Executive Order No. 10925 in 1961, the resulting segregated employment profile was maintained at least through 1964, when the company instituted testing and educational requirements for hiring, interdepartmental transfer, and intradepartmental promotion. These testing and educational requirements, which were held to be illegal in *Pettway III*, remained in effect until as late as 1971. *Pettway III, supra*, 494 F.2d at 219-20, 222, 258. As a result, in 1971

only 25% of the 232 jobs in the plant were integrated. 494 F.2d at 230.

Based on these findings we concluded that "black employees have been derogated to the lower paying, non-skill departments and to the lower paying positions in all departments because of these past discriminatory employment practices." *Id.* at 236. We then determined that the departmental seniority system acted to maintain and effectuate the stratification of black employees in the less desirable departments and in the lower paying, non-skilled jobs within all departments. The seniority system locked black employees into their present departments because a black desiring to transfer to a department with better promotional opportunities would have to forfeit seniority and often endure a wage cut in order to transfer. An employee who did transfer would be handicapped by being unable to compete equally for promotion based on departmental seniority with a white employee situated in the department at the time of the transfer. This would be true even if the white employee had less plant seniority than the black transferee. *Id.* at 223-24, 235-36. Furthermore, in many cases the requirement that initial consideration be given to persons within the department perpetuated the historical stratification of black employees by preventing the majority of class members from even applying for jobs in the higher paying, predominantly white departments. After reviewing the relevant case law, we concluded that affirmative relief was required. *Id.* at 236.

3. Pettway III Guidelines for Relief: Promotion and Transfer Procedures

In *Pettway III* we followed the well-established principle that on remand a remedy must be fashioned within the framework of the "rightful place" theory. 494 F.2d at 243. Under this theory, blacks must be "assured the first opportunity to move into the next vacancies in positions which they would have occupied but for the wrongful discrimination and which they are qualified to fill." *Id., quoting United States v. Geor-*

gia Power Co., 474 F.2d 906, 927 (5th Cir. 1973). We therefore ordered the district court to issue an injunction requiring: "(1) the posting of all vacancies plant-wide; (2) the selection of 'qualified' personnel for the vacancies on the basis of *plant-wide* seniority; (3) transferring members of the class shall retain their plant-wide seniority for all purposes including promotion, lay-off, reduction-in-force, and recall; (4) advance entry into jobs for which an employee in the class is 'qualified' or for which no specific training is necessary; (5) red circling of members of the class. . . ."[30] *Id.* at 248 (footnotes omitted).

We tempered this holding by allowing the company to demonstrate a "business necessity" for maintaining departmental lines of progression in which experience in one position is required for advancement to a higher position in the line. We stressed, however, the "heavy nature of the defendant's burden" to justify a seniority system which perpetuated past discrimination. *Id.* at 245. Quoting from *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 451 (5th Cir. 1971), we stated that "the 'business necessity' doctrine must mean more than that transfer and seniority policy serve legitimate management functions. . . . Necessity connotes an *irresistible demand*. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals." *Id.* Thus business necessity justifies existing seniority and promotion systems only where the district court finds that each position in the line of progression within a department provides necessary training for the next higher

[30] In *Pettway III* we described the red circling remedy as follows:

> Red circling is a standard remedy for eliminating past discrimination which prevented employees from reaching higher jobs and is recognized as necessary since otherwise employees could not afford to take training jobs paying lower wages. Where the job from which the employee transfers pays more than the new job, where the new job is in a department where the top wage rate is greater than the rate of the old job, the employee is paid the wage rate of the old job, until he advances to a job paying more than that rate or until he voluntarily freezes himself in at the new job.

494 F.2d at 248 n.99. Red circling is discussed in greater detail in subsection III (D) *infra*.

job and that there are no acceptable alternatives for accomplishing the company's safety and efficiency goals. *Id.* at 245-46.

We then remanded the case to the district court to frame an injunctive order which would effectuate our mandate.

4. Relief on Remand

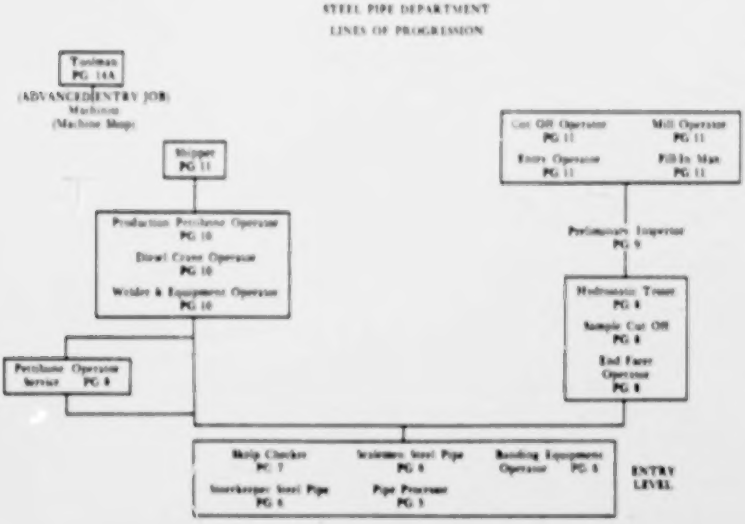
On remand the district court entered an order which effected the following changes in the company's seniority and transfer policies. Plant seniority was substituted for departmental seniority for purposes of future promotions, demotions, layoffs, and recalls, subject to a one year residency requirement for transferees to a new line of progression.[31] The court's order also prescribes a two step procedure for filling vacancies within the newly established lines of progression. Permanent vacancies are to be filled by incumbent employees working in, or laid off from, the position immediately below the vacancy in the line of progression, with bidding based on plant seniority as modified by the residence requirement. Each resulting vacancy is to be filled from within the line in the same manner, until an entry level job remains which cannot be filled from within the line of progression. At this point the second step of the bidding procedure is reached, and the entry level position is posted plantwide, with bids considered according to plant seniority. Employees bidding for a position in a new line of progression must have at least six months seniority, and the company retains the right to refuse to promote or to transfer any employee it determines is unqualified to fill a position. Furthermore, the company may return any transferring employee to his prior position at the end of a 30 day trial period, without loss of seniority, if he cannot meet the requirements for the new job.

[31]During this residency period, the transferee's departmental seniority in the new department is used for promotional purposes. Plant seniority is retained for all other purposes during the employee's first year in the new line of progression. After the expiration of this residency period, the employee's plant seniority is utilized for all purposes, including promotion.

The district court, in its attempt to reconcile the rightful place requirement with the business necessity exception to plant-wide bidding for every position in the plant, also made three general revisions in the company's lines of progression.[32]

First, the court's order created "pre-entry level" positions, consisting of unskilled jobs in the lower pay groups which do not provide experience necessary for the successful performance of the next higher-rated position. These jobs were removed from the departmental lines of progression, with the result that potential transferees can now skip over these positions and bid immediately into the higher "entry level" positions. Second, the court "boxed" together certain jobs requiring similar skills and providing roughly equivalent experience for preparing employees for the next higher position on the line. The employee with the greatest plant seniority on any job within the box would have the first opportunity to bid on the next higher-rated position. This boxing mechanism affords employees an opportunity to bypass other jobs in the box, thus hastening the

[32]The following diagram illustrates the revised line of progression for the steel pipe foundry.



rise of plant-senior class members to their rightful place within the lines of progression.[33] Finally, the court designated eight positions as "advanced entry jobs." These are higher-rated positions within certain departments, for which the requisite training can be obtained through successful performance on similar jobs in other departments without any necessity for prior departmental experience.[34] Vacancies in advanced entry jobs are to be filled through plant-wide bidding based on plant seniority.[35]

5. The Present Appeal

Appellants maintain on appeal that the promotion and transfer procedure outlined above is deficient in numerous respects and does not comport with our mandate in *Pettway III*. Before evaluating appellants' contentions, however, we must first examine the case law subsequent to *Pettway III*, and particularly the Supreme Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), to determine whether the standards enunciated in our prior decision are still applicable for purposes of this appeal.

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[33]The diagram of the steel pipe department lines of progression, reproduced in footnote 32 supra, illustrates this boxing mechanism. In this line of progression the "hydrostatic tester," "sample cut off," and "end facer operator" positions are boxed together. An employee in any of the entry level positions may bid into any of those boxed positions. Likewise, an employee in any of these boxed positions may bid for the "preliminary inspector" position.

[34]For example, in the steel pipe department, illustrated in footnote 32 *supra*, the "toolman position" is designated as an advanced entry job. A machinist in the machine shop may bid for a vacancy in the toolman position without having prior experience in the steel pipe department.

[35]In response to our mandate in *Pettway III* the court's order also provided for red circling, modified the company's reduction in work force and recall procedures, revised the qualifications for the apprenticeship program, supervisory positions, and on the job training, and established a grievance procedure and an implementation committee. Appellants' objections to these portions of the order are discussed in subsections III (D)-(G) *infra*.

B. *The Effect of Teamsters on Our Prior Mandate*

In *Pettway III* we concluded that the "neutral practices of the departmental seniority system and the posting and bidding procedure carry forward into the present the stratification of black employees into lower paying, non-skill departments and jobs resulting from past discrimination." 494 F.2d at 236. After reviewing the relevant authorities, we ordered specific affirmative relief. *See* subsection III(A)(3) *supra*.

The recent Supreme Court decision in *United States v. International Brotherhood of Teamsters*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), casts doubt upon the validity of our prior mandate insofar as it required plant-wide seniority to be calculated from the date of employment with ACIPCO. *See also United Airlines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977). In *Teamsters* the Supreme Court admitted that under the rationale of *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), a seniority system, not justified by business necessity, whose operation served to freeze the status quo of prior discriminatory employment practices, "would seem" to be unlawful. 97 S.Ct. at 1862. Nevertheless, the Court concluded that such a system would be legally valid under section 703(h) of Title VII,[38] 42 U.S.C. § 2000e-2(h), if it were a bona fide seniority system within the meaning of that section. That is to say, a bona fide system is not itself illegal merely because it perpetuates the effects of pre-Act or post-Act discrimination. 97 S.Ct. at 1843 n.30. See *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 351-53 (5th Cir. 1977), for a discussion of

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[38]Section 703(h) provides in part:
Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race . . . .

the criteria for determining whether a seniority system is bona fide under *Teamsters*.

The Court's determination that such seniority systems are not intrinsically illegal was not meant to insulate all such systems from modifications necessary to accord relief for past discrimination. With regard to relief, the Court differentiated between pre- and post-Act discriminatory practices, holding that

> [p]ost-Act discriminatees . . . may obtain full "make whole" relief, including retroactive seniority . . . without attacking the legality of the seniority system as applied to them.

97 S.Ct. at 1860. As we elaborated in *James v. Stockham Valves & Fittings Co., supra,* after considering the effect of *Teamsters* on the district court's decree:

> Seniority relief is mandatory in this case even if the district court finds the system bona fide. *See Teamsters,* 431 U.S. at 348, 97 S.Ct. 1843. The federal courts are empowered to fashion such retroactive seniority as the particular circumstances of a case may require to make whole, insofar as possible, the victims of racial discrimination in job assignments, transfers, and promotions.

559 F.2d at 355. Thus, the Court still permits seniority modifications necessary to remedy *other* illegal acts, so long as those other acts are independently actionable. *Teamsters* does, however, limit the scope of permissible relief. With regard to bona fide seniority systems, discrimination after the effective date of Title VII can no longer engender a remedy involving retroactive seniority which antedates the Act. If a seniority system "did not have its genesis in racial discrimination . . . [and] was negotiated and has been maintained free from any illegal purpose", those "employees who suffered only pre-Act discrimination are not entitled to relief, and no person may be given retroactive seniority to a date earlier than the effective date of the Act." 97 S.Ct. at 1865.

In the case at bar, the plaintiffs filed their complaint with the EEOC on November 22, 1965, attacking both pre-Act and post-Act discrimination. It is clear that the testing and educa-

tional requirements which illegally discriminated against black employees remained in effect after the original complaint was filed. 494 F.2d at 219-20, 222-23, 236. The utilization of plant-wide seniority from the effective date of Title VII is necessary to remedy these actionable post-Act discriminatory practices, and therefore is consistent with the *Teamsters* decision. In *Pettway III*, however, we provided plant-wide seniority to all employees from the date of their original employment by ACIPCO. For some employees, this seniority will antedate the effective date of Title VII. If the departmental seniority system in effect at ACIPCO prior to our decision in *Pettway III* was bona fide, this portion of the relief ordered in *Pettway III* would be inconsistent with the Supreme Court's holding in *Teamsters*. If, on the other hand, the departmental seniority system was not bona fide, it would not be protected under Section 703(h), and our prior substitution of a plant-wide seniority system for the illegally maintained departmental seniority system would be consistent with the *Teamsters* holding.

Appellants urge this court to refrain from reexamining our prior holding in light of *Teamsters*. They correctly argue that under well-settled principles of law, a decision by this court at an earlier stage of the same litigation represents the law of the case. *See Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316 (5th Cir. 1978); *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659 (5th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 402 (1975); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir.), *cert. denied*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974). As such, the earlier decision generally precludes reconsideration of any legal question that has already been decided. We recently observed that

> [t]he "law of the case" rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that . . . it would be impossible for an appellate court to perform its duties satisfactorily and efficiently and expeditiously if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal thereof.

Carpa, Inc. v. Ward Foods, Inc., supra, at 1319-20, *quoting White v. Murtha,* 377 F.2d 428, 431 (5th Cir. 1967).

The doctrine, while not a limitation on the court's *power* to reconsider its prior holding, is nevertheless an expression of good sense and wise judicial practice. *Terrell v. Household Goods Carriers' Bureau, supra,* 494 F.2d at 19, waived "only for the most cogent of reasons and to avoid manifest injustice." *Id.* at 19-20. Perhaps the most cogent reason possible for not following a previous decision in the same litigation is an intervening decision by the Supreme Court. *Id.* at 19. Indeed, this court has previously reconsidered its prior holdings on a subsequent appeal of the same case when intervening Supreme Court decisions cast doubt on the validity of the original decision. *See Jennings v. Patterson,* 488 F.2d 436, 441 (5th Cir. 1974); *McComb v. Crane,* 174 F.2d 646 (5th Cir. 1949). In *McComb* the judgment appealed from was rendered pursuant to a prior Fifth Circuit opinion holding that the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, did not permit the Administrator to collect wage deficiencies by injunction and civil contempt proceedings. Subsequently, the Supreme Court held that the Administrator could bring civil contempt proceedings. We stated that under the circumstances, "[w]e are compelled to disavow our previous decision as the law of this case and to reverse the judgment appealed from." 174 F.2d at 647.

We find ourselves bound by our decisions in *Jennings v. Patterson* and *McComb v. Crane* and therefore must reconsider the seniority determination in our prior mandate in light of the *Supreme Court's* pronouncements in *Teamsters.* We do so mindful that *Teamsters* is an extraordinary case from the standpoint of *stare decisis. See EEOC v. United Air Lines, supra,* 560 F.2d at 235-36. In the words of Justice Marshall's dissent:

> As the Court also concedes, with a touch of understatement, "the view that § 703 (h) does not immunize seniority systems that perpetuate the effects of prior discrimination has much support." *Ante,* at 1860, n. 28. Without a single dissent, six courts of appeals have so held in over 30

> cases, and two other courts of appeals have indicated their agreement, also without dissent. In an unbroken line of cases, the EEOC has reached the same conclusion. And the overwhelming weight of scholarly opinion is in accord.

97 S.Ct. at 1876 (footnotes omitted). *See also Myers v. Gilman Paper Corp.*, 556 F.2d 758 (5th Cir. 1977) (on petition for rehearing). We also recognize that this result is inconsistent with the policies of finality in an ongoing lawsuit. As the Second Circuit eloquently stated in affirming the district court's application of *Teamsters* in a somewhat similar procedural setting:

> [W]e are troubled with the result in this case. . . . [I]t would seem to make a nullity of judicial determinations valid when they were made, and intended to have permanent effect. Litigation of issues like those raised in the instant case can take years to accomplish—years during which governing precedents can change, sometimes substantially. When such changes occur early in the course of litigation little judicial effort is wasted. But when, as here, changes come after factual determinations have been made, the relevant law has been stated, the majority of relief has been granted, and an appeal has been taken and dismissed by this court, the judicial system is necessarily faced with momentous waste of time and industry if virtual relitigation of the issue is required. In those substantive legal areas in which litigation is necessarily protracted, and legal development swift, the dangers of neverending litigation portrayed so vividly in Dickens' *Bleak House* became an ever-present possibility.

Acha v. Beame, 570 F.2d 57, 64 (2nd Cir. 1978) (No. 77-6119, January 12, 1978) (Slip op. at 1042 n. 8).

Nevertheless, the Supreme Court's decision still discloses the controlling law, which we are bound to apply. In *James v. Stockham Valves & Fittings Co., supra*, we considered for the first time the effect of *Teamsters* on our prior case law and concluded that *post*-Act discriminatees may receive seniority relief under *Teamsters* without attacking the legality of the seniority system as applied to them. Judge Wisdom, writing for the

court, underscored the importance of the distinction between pre- and post-Act discriminatees:

> In this case the plaintiffs have proved that Stockham engaged in post-Act discriminatory employment practices in job allocation, testing, craft training and selection, and promotion. Any black injured by these practices is entitled to relief, including retroactive seniority. The issue whether the seniority system at Stockham is bona fide under section 703(h) of Title VII is relevant to this case only if the district court concludes that the class . . . consists of some blacks who suffered only pre-Act discrimination.

559 F.2d at 351. As in *James*, the plaintiffs here have proved that the company maintained illegal testing and educational requirements and subjective selection criteria which relegated black employees to less desirable departments and to lower paying positions in all departments during the post-Act period between 1965 and 1971. They are entitled to relief from the effects of these practices, including retroactive seniority. Moreover, unlike the situation in *James*, there is no question here that every member of the class has been subjected to the illegal post-Act practices. As the class consists only of persons employed as of or subsequent to the effective date of Title VII, no class member suffered *only from* pre-Act discrimination. Every member of the class is a post-Act discriminatee. Thus every class member before us is entitled to seniority relief.

In *Teamsters*, however, the Court restricted the *scope* of permissible seniority relief for post-Act discriminatees operating under bona fide seniority system. The court stated that on remand "no person may be given retroactive seniority to a date earlier than the effective date of the Act." 97 S.Ct. at 1865. A panel of the Seventh Circuit recently concluded that the seniority system at issue was bona fide under *Teamsters* and accordingly modified a district court's plant-wide seniority order by redefining "company seniority" to mean "either total tenure with the company *after* July 2, 1965 (the effective date of the Civil Rights Act of 1964), or total departmental seniority

whichever is greater." *E. E. O. C. v. United Air Lines*, 560 F.2d 224, 234 (7th Cir. 1977). Thus, if the departmental seniority system at ACIPCO is bona fide, plant seniority may not antedate the effective date of Title VII.[37]

The issue of whether the departmental seniority system at ACIPCO is bona fide was not legally relevant when this case originally was tried. Consequently, there have been no factual determinations on this question. On remand the district court should allow the parties to present evidence on the bona fides of the departmental seniority system. In evaluating this evidence, the Court should be guided by our recent decision in *James v. Stockham Valves & Fittings Co., supra*, 559 F.2d at 350-53, which discusses the factors relevant to the court's determination. We add only that the court should consider, in addition to those factors outlined in *James*, whether the depart-

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[37]We note here that in our prior opinion we specifically stated that "[o]ur holdings and the relief directed are granted both under Title VII *and section 1981* unless otherwise stated." 494 F.2d at 217 n. 6 (emphasis supplied). Later we commented that "[d]iscrimination prior to the effective date of Title VII, July 2, 1965, can be considered under two theories. Since the appellant's allegations are also made under 42 U.S.C.A. § 1981, employment practices prior to 1965 may be examined. [We then explained the relevance of pre-Act conduct under Title VII.]"
494 F.2d at 218 n. 10.

Appellants maintain that *Teamsters* does not affect our prior holding to the extent that it was grounded in 42 U.S.C. § 1981. Two of our sister circuits have recently split in this issue, the Fourth Circuit holding that bona fide seniority systems which are protected by section 703(h) of Title VII are not violative of section 1981 and the Third Circuit reaching a contrary conclusion that section 703(h) does not affect the remedial powers of the federal courts under section 1981. *Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978), 46 U.S.L.W. 2610 (May 23, 1978); *Bolden v. Pennsylvania State Police*, 578 F.2d 912 (3rd Cir. 1978), 46 U.S.L.W. 2618 (May 23, 1978). Assuming, as we must, that Congress intended section 703(h) to accord absolute protection to pre-Act seniority rights which accrued under bona fide seniority systems, Congress could not have intended such seniority rights to remain subject to revision under section 1981. The same protections should apply whether the seniority system is challenged under Title VII or section 1981. We therefore agree with the Fourth Circuit's holding in *Johnson* that the protection accorded bona fide seniority systems by section 703(h) apply whether suit is brought under Title VII or section 1981.

mental seniority rights of ACIPCO's employees arising from employment prior to 1965 vested subsequent to the filing of this lawsuit. A finding that employees' rights under the departmental seniority system did not vest until 1971, as maintained by appellants, would indicate that the seniority system was designed to perpetuate the effects of the company's illegal post-Act practices and thus that the system had its genesis in racial discrimination.

The district court should make detailed findings concerning this factor and each of the criteria outlined in *James*. If, based on these findings, the court concludes that the departmental seniority system was not bona fide, the plant-wide seniority provisions mandated in *Pettway III* should be retained. If the court finds that the departmental seniority system was bona fide, it should modify its decree by redefining "plant seniority" to mean either total tenure with the company after July 2, 1975 or total departmental seniority, whichever is greater. In either case, the remaining requirements for affirmative relief mandated in *Pettway III* retain their validity. We therefore shall proceed with our examination of the injunctive provisions of the decree fashioned below. Throughout our discussion we will refer to the term "plant seniority," although its precise definition must await the outcome of the district court's examination of whether the departmental seniority system in effect in 1971 was bona fide.

C. *Adequacy of the Promotion and Transfer Procedures Adopted Below*

Appellants allege that the promotion and transfer procedures adopted by the district court, *see* subsection III(A)(4) *supra*, are insufficient to guarantee class members their rightful place within the company and do not comport with our mandate in *Pettway III*. To evaluate this contention, we must first determine whether the district court's order ensures that class members reach their rightful place within the company at the first available opportunity. *See Pettway III*, *supra*, 494 F.2d at 243. If the procedures adopted by the district court do not fully

effectuate this goal, we must then consider whether the impediments to the achievement by class members of their rightful place are justified by business necessity.

1. Rightful Place

To recapitulate briefly our discussion in subsection III (A) *supra*, class members generally are concentrated in the less desirable departments and tend to have relatively low departmental seniority and position within the lines of progression when compared to their plant seniority. In *Pettway III* we found that this phenomenon resulted from ACIPCO's past discriminatory practices and ordered the district court to frame an injunctive decree which utilized plant seniority as a mechanism for ensuring class members the opportunity to reach their rightful place within the company. Although the procedures adopted by the district court improve the opportunities of class members for both intradepartmental promotion and interdepartmental transfer, our careful examination of the record convinces us that the remedy fashioned below falls short of the rightful place goal. With regard to interdepartmental transfer, the new procedures do allow for entry into the new department at a higher level than was formally possible by removing from the former lines of progression some 61 pre-entry level jobs. Consequently, transferees now have the opportunity to enter a new department in a position which is higher up the line of progression than the previous entry level jobs.[38] However, the

[38]The company argues that the eight "advanced entry" positions, which are posted plantwide with bids based on plant seniority, also provide an opportunity for interdepartmental transfer into advanced positions. These advanced entry positions, however, appear unlikely to benefit class members significantly in the near future. First, only eight out of some 230 jobs in the plant are designated as advanced entry positions. Moreover, between 1965 and 1971 six of these jobs never became vacant. More importantly, the prerequisite job experience in other departments will, for the most part, preclude black applicants from bidding on advanced entry positions. For example, qualifications for the "machinist" advanced entry position in the electrical department requires the transferring black worker to have occupied the machinist "A" position in the machine shop. The record indicates that not a single black employee occupies one of over

advantage held by workers already in the department over blacks desiring to transfer remains substantially the same. All job vacancies are offered first to employees within the department in the position below the vacancy. Even vacancies in entry level positions are not posted plantwide until workers within the line of progression, or laid-off from it, decline the position. Thus, while lines of progression within the departments have been substituted for departmental pay scale units, the initial preference given to employees within the department remains.

Other deterrents to interdepartmental transfer which we criticized in *Pettway III* are also not entirely eliminated by the court's order. Previously, a black employee was deterred from transferring to a department with greater promotional opportunities because he would lose his accumulated seniority and suffer a cut in pay.[39] Since departmental seniority was the criterion for promotion, a transferee would be unable to compete effectively for future vacancies once he transferred. Under the district court's decree the transferee retains his plant seniority, but seniority is relevant only if a job immediately above the entry position in the line of progression becomes available. The boxing of many jobs in both entry level and advances positions is a positive step, permitting job skipping which substantially reduces the number of steps in each line of progression and accelerates advancement up the line. Nonetheless, the key requisite for promotion is position within the line rather than plant-wide seniority, and an employee desiring to transfer must forfeit his position in the former line of progression and move to what will generally be a lower position in a new line. This loss of position within the line of progression will have a simi-

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60 machinist "A" positions. For many of the other seven advanced entry positions, the inability of class members to meet the requisite qualifications renders the advanced transfer opportunity equally illusory.

[39]The red circling remedies in the court's order which were designed to ameliorate the wage deterrent to transfers are discussed in subsection III (D) *infra*.

lar effect in deterring transfers as did loss of seniority under the former system.

The district court's plan also fails to rectify fully the effects of past discrimination with regard to intradepartmental promotion. Although departmental seniority is no longer determinative of intradepartmental promotion, the bidding advantage of class members with superior plant seniority is decisive only with respect to white employees at the same level on the line of progression; class members, even if plant senior, may not bid against employees occupying a higher position on the line. The competitive position of class members with relatively high plant seniority is improved by the elimination of departmental seniority as a criterion for promotion, and to the extent that positions in the line of progression open up fairly frequently, the use of plant seniority should greatly accelerate the advancement of these class members. However, under the new system *position* in the line is even more important than plant seniority in determining who may bid on a vacancy, and as we concluded in *Pettway III*, position is precisely what class members lack. 494 F.2d at 218 n.9. The superior position of white employees vis-a-vis blacks is a direct result of the earlier opportunities for whites in the more desirable departments and of the illegal testing and education requirements for promotion. The new promotion system in some respects perpetuates the effect of these discriminatory practices. We have already noted that employees with superior departmental seniority have been able to outbid these class members when even higher positions in the line become vacant. In some circumstances the new promotion system actually will advantage whites over class members with superior plant *and* departmental seniority. Until May 1975, vacancies were filled by the bidder with the greatest departmental seniority, who also was qualified for the position. While the illegal testing and education requirements were in effect, departmentally junior whites were permitted to advance beyond "unqualified" but senior, blacks. Once the illegal testing and education requirements were lifted, however, a black worker theoretically could compete with departmentally junior

white workers who had advanced to superior pay group jobs. Now, however, black workers are in an inferior bidding position to these departmentally junior whites who gained superior positions in the line as a result of the testing and education impediments to the advancement of class members.

In sum, past discriminatory practices have allowed many plant junior white employees to gain superior position within the lines of progression vis-a-vis class members. Position has now become the threshold qualification for bidding on vacancies. Thus despite the use of plant seniority to distinguish between bidders on the same level in the line, the requirement that jobs be held in a sequential order in any line of progression tends to "lock in" formerly victimized blacks, thereby perpetuating the effects of past discrimination and prolonging the journey of class members to their rightful place within the company. As we discussed above, the same is also true of the interdepartmental transfer procedure. To justify the new promotion and transfer system, the company thus bears the "heavy burden" of demonstrating that each position in a line of progression provides necessary training for the next higher position. We now turn to the crucial question of whether the new lines of progression are supported by the requisite showing of business necessity.

2. Business Necessity

a. *Lines of Progression*

In subsection III(A)(3) *supra* we noted the well-established principle that a promotion and transfer system which impedes the attainment by formerly discriminated-against class members of their rightful place within the company must be justified by business necessity. We have recently had several occasions to reiterate the heavy burden that the law places on a defendant seeking to prove that such structural impediments are essential to goals of plant safety and efficiency. *See, e. g., James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 350 (5th Cir. 1977); *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1183 (5th Cir. 1976).

To ensure that the decree framed on remand would effectuate the remedial purposes of Title VII, while at the same time give due regard to the company's interests in efficiency and safety, this court in *Pettway III* instructed the district court as follows:

> The appellants ask that the district court be directed to require that vacancies be posted initially for *plant-wide* bidding and filled by a qualified employee with the greatest *plant-wide seniority*. . . . Under the "rightful place theory" we agree. . . . Therefore, the district court should issue an injunction requiring: (1) posting of vacancies plant-wide; (2) the selection of "qualified" personnel for the vacancies on the basis of *plant-wide* seniority; (3) transferring members of the class shall retain their plant-wide seniority for all purposes including promotion, lay-off reduction-in-force, and recall; (4) advance entry into jobs for which an employee in the class is "qualified" or for which no specific training is necessary; (5) red circling of members of the class; (6) establishment of specific residency periods in lines of progression where the company has established prerequisite training as a "business necessity."

494 F.2d at 248-49 (footnotes omitted) (emphasis in original). The clear import of this instruction was that as a prima facie matter *every* position within the company should be open to plant-wide bidding, with vacancies to be filled by the bidder with the most plant seniority who was "qualified" for the job. Only where the company clearly demonstrated on the record the existence of business necessity for particular prerequisite jobs within a line of progression could bidding be based solely on position within the line. Even then, however, we required that the line be carefully structured and that advanced entry and job skipping be allowed where requisite experience could be achieved outside the line or in lower level positions within the line itself.

Our examination of the record and the lines of progression fashioned below convinces us that the district court did not follow this mandate. In general, the district judge made only

the most perfunctory and conclusory findings to support the injunctive portions of its decree.[40] No new hearings were held

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[40]We reproduce the district court's findings and conclusions in support of the injunctive portions of its decree in their entirety:

The Court finds and concludes from all the evidence:

(a) That business necessity had been shown and established for the basic principles involved in the line of progression concept used in and governing the structure of the Company's various lines of progression, charts of which are attached as Appendices to the Decree of May 14, 1975 and the Judgment of June 12, 1975;

(b) That business necessity has been shown and established for the Company's revised promotion, transfer, layoff, recall and other employment practices collectively referred to as Seniority Rules and Regulations attached as Appendix B to and approved in the Decree of May 14, 1975;

(c) That the one year waiting period before plant age may be used by a new entrant into a line of progression for promotional purposes is necessarily required to insure a minimum period of training and experience before rising to more responsible positions in the line of progression and thereby avoiding a significant hazard to personnel and equipment and a substantial adverse effect upon the efficiency of the operation conducted by the line of progression;

(d) That the removal of pre-entry group jobs from the Company's lines of progression and the identification of advanced entry jobs together with the provision for filling vacancies in entry level jobs and advanced entry jobs through plantwide bidding using plant seniority properly and adequately afford promotional and transfer opportunities to eliminate any continuing effect of past discrimination consistent with business necessity of the Company;

(e) That the rate retention provision set out in paragraph 7 of the Court's Decree of May 14, 1975 properly and adequately encourages and protects the earnings of any black employee who takes opportunity to transfer to a new line of progression in another department from which he may have been inhibited or restricted by the Company's test and educational requirements existing prior to February 18, 1968 but at the same time protects the Company against loss of efficiency and needless waste of training time and cost which would result if black employees occupying and enjoying the pay of the semi-skilled and skilled jobs in pay groups above pay group 8 were encouraged to transfer out of those jobs by unrealistically high rate retention;

(f) That business necessity has been shown and established for the basic principles incorporated in the Company's apprenticeship program and in its on-the-job training program as modified by paragraphs 8 and 9 of the Decree of May 14, 1975;

and no additional evidence was introduced into the record. Instead, explicit reliance was placed upon a record which this Court had already determined to be wholly inadequate to support a finding of business necessity on most of the issues on remand. With regard to the specific issues of business necessity to support the lines of progression fashioned below, the district court's findings of fact merely states in conclusory terms

> That business necessity had been shown and established for the basic principles involved in the line of progression concept used in and governing the structure of the Company's various lines of progression. . . . [and] for the Company's revised promotion, transfer, layoff, recall and other employment practices. . . .

Not only is the record bare of factual support for these findings with regard to lines of progression in many of the departments, but the record indicates that the district court failed to follow our instructions in evaluating business necessity.

In *Pettway III* we acknowledged that not every class member should be considered for every position within the company. "In an industry involving sophisticated machining processes such as many of the operations of this company, training of employees for skilled positions is a necessary function for the continued economic life of the business." 494 F.2d at 246. We found, however, that although "[t]he company has evidence in the record that significant portions of its operations require skillful craftsmenship," "it has failed to demonstrate that every position at the plant is so complex or specialized as to require, without exception, step by step progression within each depart-

(g) That business necessity has been shown and established for selecting personnel for promotion to supervisory positions from those incumbents on the one or two top jobs in a line of progression in order to obtain a supervisor with requisite skills and technical knowledge needed to supervise and direct the work under such personnel's supervision and that qualified black employees are being selected for supervisory positions without regard to race, the Company having fourteen black foremen and leadmen as of January 1, 1975 as compared to only two in 1971.

ment." *Id.* More specifically, we concluded after careful examining the trial record that

> The record discloses *no proof* by the company that positions in other than craft or technical lines of progression are functionally related. The plaintiffs themselves admit that craft positions require specific prerequisite training and experience. But we read the district court's findings and the record as providing *no showing* by the company that other lines of progression are functionally related.

494 F.2d at 246-47 (emphasis supplied) (footnote omitted).[41]

Despite this seemingly clear statement that the previous record did not support a conclusion that positions within the non-craft lines of progression were functionally related, Judge Lynne candidly remarked at the October 31 hearing that

> I feel . . . that with the exception of the back pay award . . . I would have entered the [affirmative relief] judgment which I did enter on May the 12th without any evidentiary hearing whatsoever *on the basis of the previous record.*

(A 1168)

That Judge Lynne must have relied on the 1971 trial record to support his finding of business necessity in the non-craft positions is made clear by the total absence of evidence in the record on remand concerning business necessity. This reliance by Judge Lynne on the prior record is in direct contravention of our holding in *Pettway III.*[42]

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[41]We later reiterated this conclusion:

[O]nly to those jobs in lines of progression shown by the company to be functionally related does this finding of business necessity attach. The record thus far clearly reveals that only the craft positions are functionally related.

Id. n.96.

[42]The defendant would have this court reconsider its finding that the 1971 trial record discloses no proof that positions in non-craft lines of progression are functionally related. Indeed, the defendant states in its reply brief that

> The record before this Court in the last appeal was quite voluminous and did in fact contain substantial proof of such functional relationship, consisting mostly of unrebutted testimony, which must have been *inadvertently overlooked or misinterpreted by this Court.* (emphasis supplied).

We reiterate that evidence adduced at the 1971 trial is insufficient to support a finding of business necessity in the non-craft departments. Neither can this finding be supported by

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While we readily admit that we are capable of making mistakes, the three examples of trial testimony quoted in the defendant's reply brief which purport to demonstrate the functional relationship of jobs in the non-craft lines fail to convince us that a mistake has been made here. The company first quotes the following testimony from the superintendent of the steel foundry department:

> Q. Mr. McCauley . . . I will ask you to look at the sheet marked Steel Foundry, normal lines of progression. Are you familiar with the lines of progression set out on the chart?
> A. Yes.
>
> . . . . . .
>
> Q. I will ask you in your experience are those in your opinion, those lines of progression functionally related? (sic)
> A. *We think they are very sound.* This is the type thing we have followed for many years and it has served a very good purpose. (A. 905-906) (Emphasis added).

Next, the following testimony from the Melting Superintendent, Mr. Carlson, is reproduced:

> Q. I will ask you whether or not [the Melting Department LOP's] are functionally related in your opinion?
> A. Yes, these would be the normal lines of progression.
> Q.Do jobs in the lower pay group furnish experience and training towards the higher rated jobs?
> A. Right.

Finally, defendant's reply brief quotes the following colloquy between the court and an ACIPCO Vice President:

> THE COURT: Mr. Coupland, is it your opinion that the lines of progression in which have been followed by American Cast Iron Pipe Company in the past and which are represented by the graph I have seen or the diagrams, is it your opinion they are functionally related to the performance of the plant as a whole?
> A. Yes, sir, we think so.

This not so astonishing response by an ACIPCO official and the general conclusory statements by Mr. McCauley and Mr. Carlson simply do not support a finding of business necessity. To paraphrase a recent Eight Circuit opinion, this testimony does not constitute "evidence that each job was an essential prerequisite to the next higher job in every line of progression. *Some general evidence only* was presented about general structures of lines of progression and their business convenience. But that evidence was not specific enough to meet the test of business necessity." *Rogers v. International Paper Co.*, 510 F.2d 1340 (8th Cir.), *vacated on other grounds*, 423 U.S. 809, 96 S.Ct. 19, 46 L.Ed.2d 29 (1975). In *Pettway III* we required that functional relationships to support a finding of busi-

evidence entered on the record subsequent to our remand in *Pettway III*. Indeed, the record on remand is totally devoid of competent evidence of business necessity. The company argues that the court's decree was reached through "informal processes" suggested by this court in *Pettway III* and that a formal trial is not a necessary prerequisite to the entry of the injunctive order. We cannot agree. As we explained in the introduction to this section, the injunctive portions of the decree were entered as the court's own judgment, and as such, must be supported by evidence in the record.

We therefore conclude that Judge Lynne's finding that the lines of progression in the non-craft departments[43] are functionally related based on the doctrine business necessity is unsupported by the record and must be reversed.[44]

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ness necessity be demonstrated for each position. The testimony quoted above fails to demonstrate such a relationship either position by position, line by line, or verse by verse. Likewise, our examination of those portions of the 1971 trial record cited in the defendant's reply brief reaffirms our conclusion in *Pettway III* that the record is insufficient to support a finding that positions in the non-craft lines of progression are functionally related.

Finally, we note that this appeal is not the proper vehicle for presenting defendant's disagreement with this court's holding in *Pettway III*. Alleged errors in a prior decision are properly raised in petitions for rehearing or by writ of certiorari to the Supreme Court. The "law of the case" doctrine, discussed in subsection III (B) *supra*, precludes reconsideration of decided questions on a subsequent appeal, absent the most cogent reasons such as the avoidance of manifest injustice. *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 19-20 (5th Cir.), *cert. denied*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974). *See also Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316 (5th Cir. 1978). No such reasons are present here.

[43]We refer to the monocast, fittings foundry, steel foundry, melting, steel pipe foundry, general yards, central stores, shipping, and construction departments.

[44]Similarly, the one year residency requirement established for the non-craft departments must be reversed. The district court's order provided that departmental seniority, rather than plant seniority, shall be utilized for promotional purposes during the first year of an employee's transfer to a new department. After the expiration of this one year residency period, plant seniority is fully restored. *See* footnote 31 *supra*. The court recognized that this residency period would impede the rise of class members to their rightful place in the company, but found that an across-the-board residency requirement was necessary to familiarize each transferee

The situation is somewhat different with regard to the craft and technical departments.[45] In *Pettway III* we found that evidence from the 1971 trial supported the conclusion that the lines of progression within these departments were functionally related. 494 F.2d at 246-47. Our examination of that record and the modified lines of progression adopted below convinces us that the district court's finding of business necessity for lines of progression in the craft and technical departments is fully supported by the record. We therefore affirm that portion of the court's injunctive decree.[46]

b. *Transfer Procedures*

We have already determined that the evidence does not support the district court's finding that the lines of progression in non-craft departments are functionally related. It necessarily follows that the evidence does not support the court's finding of business necessity for limiting interdepartmental transfer into the non-craft departments to entry level and advanced entry positions. Where it has not been demonstrated that experience in the entry level positions is necessary for successful performance in the next higher-rated positions, the company may not preclude potential transferees from bidding on the more advanced positions. Accordingly, this portion of the injunctive order must be reversed.

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with his new line of progression and was thus necessitated by business necessity. *See* footnote 40 *supra*. Given our determination that the company has not established a functional relationship between positions in the non-craft lines of progression, a one year loss of plant seniority which impedes progress to the next position in the line of progression cannot be supported by reference to such a relationship. The requirement that bidders for a higher position in the line of progression be "qualified" to fill the vacancy fully protects the company's interest in plant safety and efficiency. We therefore vacate the one year residency requirement for the non-craft departments.

[45]This category consists of the machine shop, electrical, maintenance, and inspection departments.

[46]Similarly, we find that the one year residency period established in the craft positions in supported in the record by a showing of business necessity and consistent with our mandate in *Pettway III*, see 494 F.2d at 249 and n. 106.

The district court's order also provided that employees within a department shall have an opportunity to bid on vacancies in entry level positions *before* those jobs are posted plant-wide. If a position is designated as entry level, experience in the line is by definition unnecessary. Under the circumstances, we do not understand how business necessity could possibly justify providing incumbent employees in a department the first opportunity to bid on an entry level vacancy. Therefore, this portion of the decree must also be reversed for both the craft and non-craft departments. The procedures for transfer into craft and technical departments are in all other respects affirmed.

3. Remedy

ACIPCO has now had two opportunities to demonstrate business necessity for lines of progression in the non-craft departments. It has failed both times to satisfy its burden of submitting competent evidence on the record that these lines of progression are functionally related. We cannot allow the vindication of the statutory rights of black employees to await yet another proceeding below and a possible third appeal to this court. The time has come for definite, if preliminary, action. Therefore, we direct that on remand the district court modify its injunction to require that all vacancies in the non-craft departments be posted plant-wide for bidding based on plant seniority. Vacancies shall be filled by the senior-most bidder who is deemed "qualified" for the position. We reiterate our statement in *Pettway III* that

> "By the term 'qualified' we mean ability which is *not* to be determined solely by reference to experience in the line of progression of a department. . . ."

494 F.2d at 249.[47] On remand the district court should direct

[47] For example, we stated in *Pettway III* that a forklift operator in the mono-cast department should be able to transfer to a forklift operator position in some other department. 494 F.2d at 249. Despite the company's attacks on the "academic character" of this example, we adhere to

the company to devise objective standards for measuring qualifications.[48] Class members who are dissatisfied with a determination by the company that they are unqualified to fill a particular vacancy may submit a complaint through the grievance procedure provided in the May decree.[49]

The decree should also be modified to provide that vacancies in all entry level positions, including those in the craft and technical departments, be posted plant-wide from the outset. Employees working in a line of progression should not be given the first opportunity to bid on such vacancies.

Finally, nothing in this opinion should be construed to mean that the company must place anyone in a job for which he is not qualified. We recognize that some positions in the non-craft departments may be functionally related to other positions in the same line of progression. The provision in the decree

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the position that the company may not preclude advanced entry into lines of progression *solely* because the transferee is unfamiliar with the production process in the line. The company's argument if accepted, would justify *never* allowing advanced entry into *any* line of progression.

[48]The court's decree incorporates by reference the company's "Policies, Rules, and Procedures" governing seniority, promotions, and bidding. This policy statement provides that

> Qualifications considered in promotion are:
>
> A. Skill, knowledge, training, and efficiency
>
> B. Physical fitness
>
> C. Length of service
>
> Where factors A and B [are] *relatively equal*, employees with the greatest length of plant continuous service will be given preference.

Insofar as this definition of "qualifications" allows the company to fill vacancies on the basis of comparative skill, knowledge, and training *before* seniority is considered, it is inconsistent with our mandate in *Pettway III*. If accepted, this definition would allow the company in almost every case to place an incumbent in the line because he was "*more* qualified" than a transferee, even though the transferee may be fully qualified and have superior plant seniority. On remand the court must provide that bidding be based initially on plant seniority. The company may then reject the senior-most bidder only if he fails to meet a threshold level of skill, knowledge, and training necessary to perform that job adequately.

[49]The life of the implementation committee, designated by the court to monitor compliance with the May 1975 decree, should be extended for a reasonable time after the district court issues a modified order in compliance with this opinion.

that vacancies be given to the senior-most bidder only if he or she is "qualified" should adequately protect the company's interests in safety and efficiency in such situations. While on remand the district court shall first issue a modified injunction requiring plant-wide bidding based on plant-wide seniority for each vacancy in the non-craft departments, the court may, at its discretion, retain jurisdiction and commerce further proceedings to give the defendant a final opportunity to prove business necessity for making experience in certain jobs a prerequisite for bidding on other positions in the non-craft lines of progression and for establishing residency periods consistent with our mandate in *Pettway III*. 494 F.2d at 249 and n.106.[50] Where the court concludes that new evidence entered into the record by ACIPCO demonstrates the existence of a functional relationship between positions within a line of progression, it may further modify its injunction. In the event that this occurs, however, the court should make detailed findings, based on the new proceedings, concerning the interrelationship of the positions and the possibility of advanced entry and job skipping. *Watkins v. Scott Paper Co., supra*, 530 F.2d at 1183, *Stevenson v. International Paper Co.*, 516 F.2d 103, 114-15 (5th Cir. 1975).

To reiterate, the district court shall put into immediate effect an injunctive decree providing for plant-wide bidding on vacancies in non-craft lines of progression, limited only by ob-

[50]ACIPCO has now had two opportunities to show business necessity justifying its proffered lines of progression. Ordinarily, we would be reluctant to provide ACIPCO yet a third opportunity to do so. We recognize, however, that ACIPCO's failure to supplement the record following our remand in *Pettway III* may have been due in part to the unusual nature of the proceedings below. Defendant represents that the district court considered arguments and evidence in chambers which supported its findings of business necessity. We have no way of evaluating this contention or of allocating responsibility for defendant's failure to enter this "evidence" in the record once settlement negotiations broke down. The district court is in a far better position to judge the equities of the situation. Accordingly, we leave the question of whether ACIPCO should be provided a third opportunity to prove business necessity to the discretion of the district court.

jective qualifications as defined above. Determinations by the company that a class member lacks the requisite qualifications for serving in a particular position must be made on an individual basis and may not be based solely on failure to have served in the line of progression in which the vacancy occurs. Once this system is in effect, the court may, at its discretion, afford the company one final opportunity to demonstrate, by non-conclusory evidence on the record, the existence of particular functional relationships within the non-craft lines of progression. If the court is satisfied that company has met its heavy burden of demonstrating the business necessity of a particular line of progression, it shall make detailed findings to that effect and may make such modifications to the injunctive decree as are justified by the evidence in the record.

D. *Red Circling*

A class member wishing to transfer to a department with greater promotional opportunities might be deterred from doing so if the initial entry position in the new department paid a lower salary than his current job. The red circling remedy allows a transferee to retain his old wage rate until he has had an opportunity to learn the necessary skills to progress in the new department to a salary equal to his old departmental wage rate. *See* footnote 30 *supra*. It thereby eradicates "the obvious impediment of lowered wages to transfer to a new department." *Swint v. Pullman-Standard*, 539 F.2d 77, 101 (5th Cir. 1976). *See Watkins v. Scott Paper Co., supra*, 530 F.2d at 1173-74; *Stevenson v. International Paper Co.*, 516 F.2d 103, 112-13 (5th Cir. 1975). In *Pettway III* we concluded that the red circling remedy was necessary to effectuate the rights of black employees at ACIPCO:

> [w]here a job from which the black employee transfers pays more than the new job in a department where the top pay grade is greater than the rate of the old job, a member of the class shall be paid the wage rate of the old job *until he advances to a position paying more than that rate or until he voluntarily freezes himself in at the new job.*

494 F.2d at 249 (emphasis supplied).

The district court's decree on remand provided for red circling. Appellants now argue on appeal that certain limitations placed on the red circling remedy by the district court are inconsistent with the remedial purposes of Title VII and with our mandate in *Pettway III*. We consider these in turn, noting initially that any restriction on the availability of the red circling remedy must be justified by business necessity if it impedes the movement of former discriminatees to their rightful place. *Stevenson v. International Paper Co.*, 516 F.2d 103, 112-13 (5th Cir. 1975).

Appellants first object to the provision in the decree which limits the red circling remedy to class members employed at ACIPCO prior to February 18, 1968, the date that the company eliminated its illegal testing requirements for promotion within the first eight pay groups. The company attempts to justify this provision by arguing that employees hired after that date could not have been harmed by the testing requirements then in effect for pay groups 9 and above. Such requirements were eliminated in March, 1971. As the company points out, the then-current rate progression schedule imposed a six-month residency requirement at each pay group level. Accordingly, no employee hired after February 18, 1968 could have been eligible for a pay group 9 job by March 1971. Appellants respond that the interdepartmental transfer procedures, one source of the discriminatory barrier which red circling was designed to correct, continued at least until the date of the decree. Appellants' argument, however, assumes that the interdepartmental transfer procedures and departmental seniority provisions are themselves illegal. We carefully pointed out in *Pettway III* that these procedures should be enjoined, not because they are illegal, but because they "carry forward into the present the stratification of black employees into lower paying, non-skill departments and jobs resulting from past discrimination." 494 F.2d at 236. We accept the company's statement that employees hired subsequent to February 18, 1968 could not have been harmed by discriminatory testing or edu-

cational requirements. Plaintiffs have not demonstrated on the record that employees hired after that date were discriminatorily placed in the traditionally non-white departments.[51] The record thus supports the conclusion that employees hired after February 18, 1968 were not harmed by discriminatory testing and education requirements for promotions. This portion of the district court's order is therefore affirmed.

Appellants also complain that the district court's decree sets a maximum red circle retention rate equal to the pay group 8 wage rate.[52] The company attempts to justify this limitation by arguing that positions above pay group 8 generally consist of skilled jobs, and transfers into lower-paying jobs in new departments would result in a less efficient utilization of existing skill and training. According to the company, it would be "unwise" in terms of operating efficiency to encourage movement out of better-paying skilled jobs into unskilled or semi-skilled positions.

While we are sympathetic to the company's position, we cannot ignore the effect of the wage rate limitation on black employees who have reached pay groups 9 and 10 in the limited opportunity departments and now desire to transfer to a higher opportunity promotional unit from which they had previously been excluded by discriminatory practices. In *Watkins*

[51]Indeed, the statistics relied on in *Pettway III* to support our conclusion that black workers were excluded from higher paying, traditionally white departments by discriminatory practices persisting at least until January 1971 are at best equivocal on the issue of discriminatory *hiring* subsequent to 1968. *See Pettway III, supra,* 494 F.2d at 227 (Chart B), 228-32, 236.

[52]Actually, the decree provides that the retained rate shall not exceed the lower of (1) the standard hourly wage rate in effect for jobs in pay group 8 on the date of the employee's transfer or (2) the standard hourly wage rate of the highest job in the line of progression to which the employee is transferring. This second qualification prevents an employee from abusing the red circling remedy by transferring into a line of progression in which the highest paying job pays less than the employee's present salary. In such a case the employee could have no hope of ultimately improving his wage rate by the transfer, and rate retention, therefore, would unfairly penalize the company. This provision is not challenged on appeal.

v. Scott Paper Co., supra, we recently invalidated a $3 per hour wage retention limitation. Citing *Pettway III* we stated:

> Neither *Pettway,* nor any other of the red circling cases that have come to our attention, suggests that a limitation on red circling is justifiable. Instead, the cases make clear that red circling is to be complete. Any limitation on red circling requires an affected class member to pay a price for an opportunity provided by Title VII.

530 F.2d at 1174. Therefore, the reduction in wage for those transferees whose present wage rate exceeds the wage retention limitation "constitutes a term or condition of employment that discriminates against the affected class members on the basis of race." *Id.* Full red circle rate retention must be provided where the class is able to show that limitations present a practical impediment to the transfer of *any* affected class member. *Swint v. Pullman-Standard, supra,* 539 F.2d at 100-01, *citing Stevenson v. International Paper Co.,* 516 F.2d 103, 113 (5th Cir. 1975); *Watkins v. Scott Paper Co. supra,* 530 F.2d at 1174. Although the district court, writing without the benefit of our opinion in *Stevenson,* made no findings on this question, as in *Watkins,* "it is inconceivable" here that some affected class members currently earning above the pay group 8 wage rate[53] and now wishing to transfer would not be deterred by the limitation. 530 F.2d at 1174. Accordingly, on remand the district court's order should be modified to provide full red circle rate retention for eligible class members.

Appellants third connection is that the district court improperly limited the use of red circling rights to transfers made within three years of the decree. We disagree. In *Stevenson v. International Poper Co., supra,* we stated that a

> "time limitation to take advantage of red circling is . . . not *per se* unlawful. This Court has frequently recognized that the employer has an interest in reestablishing stability to his work environment and that *reasonable time limita-*

[53]As of August 15, 1971 there were 41 black employees in pay groups 9-12. *Pettway III, supra,* 494 F.2d at 227 (Chart C).

tions on the extraordinary system created to provide relief for prior discriminatees is permissible."

516 F.2d at 113 (emphasis supplied). Appellants have not demonstrated that the three year time limitation is unreasonable or constitutes an abuse of discretion by the district court. However, because of the possibility that some discriminatees have been dissuaded by the invalid portions of the red circling provisions from exercising their transfer rights, on remand the district court should extend the permissible time for exercise of red circle rights for a reasonable period beyond the date on which its modified decree becomes effective. *See Stevenson, supra,* 516 F.2d at 112-113.

Finally, appellants argue that the provisions in the decree which terminate the retained rate where the employee "fails to progress" or "declines to progress" in the new line or where "104 weeks have elapsed since his transfer" are inconsistent with our mandate in *Pettway III* and not justified by business necessity.[54] The company responds that these limitations are necessary to prevent discriminatees from relaxing their efforts to reach their rightful place by "retiring" to easy jobs at retained pay rates. The 104 week limitation is said to be generally consistent with the period required for advancement to pay group 8 from most entry level jobs.

In *Pettway III* we stated than a transferee "shall be paid" his old wage rate until he advances to a higher paying position or "until he voluntarily freezes himself in at the new job." 494 F.2d at 249 (emphasis supplied). We read the provisions in the decree terminating the retained rate where the discriminatee "fails to progress" or "declines to progress" as consistent with our prior mandate. Appellants' apprehensions that such determinations will be made unfairly by the predominantly white supervisory staff are not compelling in light of the grievance procedure provided by the decree.

[54]The decree also terminates rate retention where the employee progresses in his new line "to a job of equivalent rate to his retained rate" or where, after the first transfer, "he bids to another line of progression or department." These provisions are not challenged on appeal.

The 104 week limitation, however, must be reversed. First, the district court made no findings that this period is sufficient to allow a reasonably diligent and capable employee to advance to pay group 8 from most entry level jobs in most departments. In any event, the company does not point to sufficient evidence in the record to support such a finding. More importantly, the 104 week limitation necessarily was based on the district court's erroneous view that red circle rate retention could be limited to the pay group 8 wage rate. In light of our holding that full rate retention must be provided even to class members earning above the pay group 8 wage rate, the court on remand must reconsider the length of time following a transfer in which the red circle wage rate must remain in effect. The period adopted must be sufficient to provide a reasonably industrious and capable class member the opportunity to reach his present pay level in the more desirable departments.

We recognize that it may take longer for an employee in, say, pay group 9 to reach this pay level in a new department than for an employee in pay group 5 to reach a pay group 5 position in a new line of progression. The court is free to consider this possibility and apply a different time limitation for each pay level. We also recognize that the same employee may not advance with equal speed in every department. The court need not take account of every possible permutation and combination of transfers which might be available to class members. The court's time limitation, however, must be long enough to allow reasonably diligent and capable class members a fair and reasonable opportunity to reach their present pay group level in the departments from which blacks have traditionally been excluded.

E. *Supervisory Positions*

Prior to 1971 the company's supervisory personnel were selected by department superintendents, all of whom were white. The selection criteria included performance on illegal objective tests and the subjective judgment of the superintendents.

The testing was discontinued in 1971. In *Pettway III* we stated that the fact that only one of approximately one hundred supervisory positions was held by a black employee, when considered in conjunction with the use of illegal testing and the application of subjective standards by all-white superintendents, would *normally* present a conclusive showing of present discrimination. 494 F.2d at 240-41. However, because the company had terminated its testing requirements, we remanded the issue for a determination of "whether selection on the basis of subjective judgment of all-white superintendents operates *independently* of the testing to discriminate and helped produce this disparity." *Id.* at 241. We cautioned the court that in examining the evidence it should consider the possibility that a cessation of discriminatory treatment following termination of the illegal testing might indicate, not that the tests were the sole cause of the discriminatory barrier, but that the company had become aware of the possibility of legal sanctions and was building a record for purposes of this lawsuit. Accordingly, we instructed the court to examine on remand three indicia of discriminatory selection:

> First, as to whether there are more examples of black employees who were able to hurdle the illegal testing barriers to these supervisory positions, but then were disqualified under the subjective criteria utilized by the department superintendents. Secondly, the court should note whether less qualified white employees have been appointed leadmen or foremen both prior to March, 1971 and since that time. Finally, the court should obtain evidence of the operation of this subjective standard applied by white supervisors since the trial.

494 F.2d at 243 (footnotes omitted).

On remand the district court denied plaintiffs' requests for affirmative relief in the area of supervisor selection. The district court's May decree, which provided for injunctive relief, did not mention the factors outlined in *Pettway III*. The November 20 final order stated that business necessity had been shown for selecting supervisory personnel from the incumbents

in the one or two highest positions in a line of progression and that qualified blacks were being selected for supervisory positions without regard to race. This later finding was apparently based solely on the fact that the number of black supervisors increased from two to fourteen between 1971 and 1975.[55] There is no indication in the record that the district court considered the other factors outlined in *Pettway III* in reaching this conclusion. Mr. Adams' May 23, 1975 motion on behalf of the class for reconsideration of the May 14 decree requested an opportunity to introduce evidence on the supervisory question. This motion was denied by the court on June 12 despite our prior opinion's explicit instruction to take evidence on this issue and despite the lack of any competent evidence in the record apart from the statistics indicating an increase in the number of black supervisors. The court's finding that there are twelve additional blacks in the supervisor positions, while relevant to the ultimate question of whether blacks have been discriminated against by the use of subjective selection criteria, is not determinative of the issue.[56] *See Swint v. Pullman-Standard, supra,* 539 F.2d at 104. Moreover, the court's finding of business necessity for the selection of supervisors from the top positions in the lines of progression is distinct from the question of discriminatory selection of eligible employees from these positions. Under the circumstances, we must again remand for consideration of whether the subjective judgment of

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[55]The court in its November 20, 1975 final order concluded:

That business necessity has been shown and established for selecting personnel for promotion to supervisory positions from those incumbents on the one or two top jobs in the line of progression in order to obtain a supervisor with requisite skills and technical knowledge needed to supervise and direct the work under such personnel's supervision and that qualified black employees are being selected for supervisory positions without regard to race, the Company having fourteen black foremen and leadmen as of January 1, 1975 as compared to only two in 1971.

[56]Indeed, we have recently commented that "actions taken in the face of litigation are equivocal in purpose, motive and permanence." *James v. Stockham Valves & Fittings Co., supra,* 559 F.2d at 325 n. 18, *quoting Jenkins v. United Gas Corp.,* 400 F.2d 28, 33 (5th Cir. 1968).

all-white superintendents operates to discriminate against black employees. The district court should afford appellants an opportunity to present evidence on the effect of the subjective selection criteria both before and after 1971. As we recognized in *Pettway III*, evidence of past discriminatory selections by white supervisors is highly probative of the potential impact of such procedures in the future. The court should make specific findings of fact regarding each of the indicia of discrimination outlined in *Pettway III*. If, after weighing these factors, the court concludes that the subjective selection procedures operate to discriminate against black applicants, it should order appropriate affirmative relief to remedy the situation. In framing an injunctive order, the court should be guided by our recent decisions in *James v. Stockham Valves & Fittings Co., supra*, 559 F.2d at 346-47; *Swint v. Pullman-Standard, supra*, 539 F.2d at 104-5; and *Watkins v. Scott Paper Co., supra*, 530 F.2d at 1193-94.

F. *Reduction in Workforce and Recall Provisions*

Appellants make numerous objections to the reduction in workforce and recall provisions of the decree.[57] First, they

[57]Paragraph 2(a) of the May decree provides that:

Plant continuous service (hereinafter plant service) shall be used . . . for all purposes in which a measure of continuous service is presently being utilized. . . . [A]ll future promotions, step-ups, demotions, layoffs, recalls and other practices affected by seniority shall be in accordance with plant service provided that, (1) demotions, layoffs, and other reductions in force shall be made in descending job sequence order in each line of progression starting with the highest affected job and with the employee on such job having the least length of plant service, (2) the sequence on a recall shall be made in the reverse order so that the same people shall return to their jobs in the same positions relative to each other that existed prior to the reductions, and (3) where economic conditions necessitate an overall reduction in the plant-wide work force, employees with the lesser plant service shall, subject, however, to the Company's right to retain in its active service such employees with craft, critical job and other specialized skills as may be reasonably required for the continued efficient and safe operation of the Company, be laid off from active service with the Company prior to those employees with greater plant service, and the laid-off employees

argue that the layoff provisions discriminate against senior class members in the lower levels of a line of progression. After carefully considering the record, we conclude that this argument proceeds from an erroneous, although plausible, reading of the court's injunction. The decree provides that reductions in the workforce

> shall be made in descending job sequence order in each line of progression starting with the highest affected job and with the employee on such job having the least length of plant service.

Appellants read the crucial "descending job sequence order" phrase as allowing a less senior white worker to "bump down" a more senior black employee in a lower level position. This phrase, however, must be read in light of the provision that "layoffs . . . shall be in accordance with plant seniority." *See* footnote 57 *supra*. Thus, in the circumstance of special concern to appellants, if the employee in the highest job subject to a reduction in workforce has lower plant seniority than a black employee in the job level below him, the junior employee, even though starting from a higher position in the line of progression, would be dropped past the black worker and would continue down the line until he reached a level at which he was senior to the incumbent on the job. As so interpreted, this portion of the decree fully protects the interests of class members in reaching their rightful place in the company and is therefore affirmed.

Appellants also argue that the recall procedure devised below is invalid insofar as it gives priority to a less senior white worker, who previously held a now vacant position but was downgraded because of a reduction in workforce, over a more senior black worker who, because of past discrimination, never held the position but is now qualified for it.[58] We agree that the procedure has this effect and that it must be held invalid.

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shall be recalled to active service in the reverse order of their layoff. (A. 63-64).

[58] *See* paragraph 2(a)(2) of the May decree, reproduced in footnote 57 *supra*.

As we explained when confronted with a similar recall provision in *United States v. Hayes International Corp.*, 456 F.2d 112, 118 (5th Cir. 1972):

> If an employee in a "B" job is either laid off or remanned to a beginner job, he would be entitled to the "B" job before another beginner even though the other beginner was also qualified and more senior but had never held the "B" job. . . . These rights appear to be neutral on their face, but have the effect of allowing a residuary disadvantage to those senior Negro employees transferred to lower classifications who are also qualified to perform the higher job in that line of progression.
>
> Qualified Negroes with greater seniority cannot displace incumbent workers. However, they are to be given a preference for future vacant jobs absent a compelling business reason. . . . [T]he only person who would be preferred ahead of a junior experienced employee would be a senior qualified negro transferee. This would not endanger the safe and efficient operation of the plant.

On remand the court's decree should be modified to conform with our holding in *Hayes, supra.*[59]

Appellants raise several other objections to the reduction in workforce and recall provisions of the decree. We have examined these objections and find them to be without merit. This portion of the decree is in all other respects affirmed.

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[59]Paragraph six of the company's "Rules for Upgrading and Changing Wage Rate Jobs," adopted by the court in its May decree, is invalid for similar reasons. This rule provides that

> If a certain high level job is eliminated from a department due to changing business trends or a deep reduction in force in that department and an opening for that job skill occurs in another department, the opening will be filled with the employee with the displaced skill before opening the job for bids, or moving up a less qualified employee in the progression line. Placement of employees with displaced skills will be done with approval of the Seniority Committee.

This provision perpetuates the effects of past discrimination by giving preference for high level jobs to predominantly white employees in similar jobs in other departments over those blacks who could successfully bid on the jobs based on plant seniority and qualifications but for this preference. It has not been justified by business necessity. *See Hayes, supra*, 456 F.2d at 118.

G. *Selection Procedures for Apprenticeship and On-the-Job Training Programs*

The company's craft positions generally require a high degree of skill and are at or near the top of the wage rate scales. Incumbent employees may train for these positions through apprenticeship and on-the-job training programs operated by the company. In *Pettway III* we reversed as clearly erroneous the district court's finding that the defendant had practiced no invidious racial discrimination in the administration of its apprenticeship and on-the-job training programs. More specifically, we found that the company, as a matter of deliberate policy, totally excluded all black employees from these programs until 1961. From 1961 to 1971 the company continued to restrict black participation in these programs through the use of educational and testing criteria, age requirements, and the requirement that initial consideration for entry into the on-the-job training program be limited to bids from within the craft departments. 494 F.2d at 237-40. We ordered the court on remand to frame appropriate affirmative relief. 494 F.2d at 236-40, 250-51. Appellants claim on appeal that the district court failed to carry out our mandate in framing its injunctive decree. We therefore must examine the district court's order to determine whether it effectuates our prior mandate with regard to these programs.

1. Apprenticeship Program

At the time of our decision in *Pettway III*, applicants for the apprenticeship program were required to be 25 years of age or under. This age requirement was relaxed by four years for those having served in the military. Applicants were not restricted by department; an employee in any department could apply for any apprenticeship position. Once selected for an apprenticeship, the trainee was required to complete a three and one-half to four year course, during which time he would progress from a group 2 or 3 pay rate to the higher rate of groups 11 or 12. On completing the apprenticeship and being placed

in a craft position, the employee would be paid at the rate of pay group 12 or 13.

In *Pettway III* we concluded that the existing age requirement for the apprenticeship program perpetuated the effects of the discriminatory testing and education requirements discontinued in 1971. Class members who previously had been excluded from the program by the illegal testing and education requirements were subsequently excluded by the age requirement. We therefore directed the district court to enjoin the continued use of the age requirement and to substitute the limit of thirty-five years endorsed by the plaintiffs' expert, unless the company could establish business necessity for a different age limitation. We also held that the length of the apprenticeship period was unnecessarily long and that the company had made no showing that this training period was required by business necessity. We ordered that the length of the program be shortened unless business necessity was demonstrated. 494 F.2d at 250.

On remand the district court increased the maximum age limit for the apprenticeship program to thirty-five for class members who reached twenty-six years of age between July 2, 1965 and April 1, 1971, the date on which illegal testing and educational requirements were abolished. Employees covered by this provision were given four months to indicate an interest in being considered for a specific apprenticeship opening. The court also concluded that "the basic principles incorporated in the Company's apprenticeship program" were justified by business necessity and declined to reduce the length of the apprenticeship period.

Appellants vigorously object to the age limitation on applicants to the apprentice program imposed by the district court. Under the court's order class members between the ages of twenty-six and thirty-five may apply to the program only if they reached the age of twenty-six *before* the illegal testing and education requirements were eliminated; class members who turned twenty-six after April 1, 1971 are not eligible for the apprenticeship program under the district court's decree. Thus,

the extension of the age limit would not benefit a class member who entered the company at age eighteen and reached the age of twenty-six on April 3, 1971, two day *after* the illegal qualifications were eliminated. While it is theoretically true that this hypothetical class member was free of the illegal testing and educational requirements during some period of time in which he was eligible for the program, we are convinced that as a practical matter, this two day period of discrimination-free eligibility would not provide a realistic opportunity for entry into the program. The possibility that an apprenticeship position would open during those two days and that the discriminatee would be accepted for that position is simply too remote for us to conclude that this theoretical opportunity suffices to negate the discriminatory effect of the illegal testing and education requirements. A class member in this position is entitled to the full benefit of the relaxation of age-limit qualifications. We therefore hold that the district court's order is inconsistent with the remedial purposes of Title VII and with our mandate in *Pettway III*, which required the use of a thirty-five year age limitation unless business necessity was shown for an alternative age limitation. 494 F.2d at 250. On remand the district court's order should be modified so that the thirty-five year age limitation applies to every employee who was subjected to the illegal testing and education criteria before turning twenty-six years of age.

We recognize that in some instances this rule may provide special benefits to individual class members. For example, a hypothetical employee hired at the age of 18 one year prior to the termination of the illegal requirements would have had seven years of discrimination free eligibility for the apprenticeship program. Assuming that there is some internal business justification for the twenty-five year age limitation, it appears unfair to the company to provide this employee an additional ten years of eligibility merely because he was subjected to the discriminatory practices for one year. The injustice here, however, cannot justify the limitation adopted below which leaves many members of the class without a complete remedy for past

discriminatory practices. In the Title VII context the remedy must be broad enough, consistent with business necessity, to ensure that every discriminatee is provided opportunities previously denied to him because of past discriminatory practices. *See Pettway III, supra,* 494 F.2d at 247-50, 260-61; *See also James v. Stockham Valves & Fittings Co., supra,* 559 F.2d at 154-56; *Swint v. Pullman-Standard, supra,* 539 F.2d at 99-103. The remedy adopted below clearly fails to accomplish this goal. Our modification is fully consistent with the requirements of business necessity. *See Pettway III, supra,* 494 F.2d at 250. Under the circumstances, we hold that the decree must be revised on remand as indicated above.

Appellants also object to the provision that class members who qualify for the age limitation extension must indicate in writing an interest in being considered for a "specific apprenticeship opening" within four months of the date of the decree in order to remain eligible for an apprenticeship position until reaching the age of thirty-six. We conclude that this portion of the decree places an unnecessary and unjustifiable burden on those class members who are attempting to reach their rightful place in the apprenticeship program. The record indicates that there is a very slow turnover in apprenticeship openings; by requiring potential applicants to make a specific request within four months, the court below has effectively precluded from realistic consideration many class members between the ages of twenty-six and thirty-five. The requirement has not been justified by business necessity. On remand black employees covered by the age limit extension should be allowed to compete for any vacancies occurring prior to their thirty-sixth birthday.

Finally, we conclude that on remand the court must reconsider the length of the apprenticeship period. In *Pettway III* we stated that "[o]n remand, either by agreement of the parties or order of the court after a hearing, if necessary, the length of the apprenticeship should be shortened with varying periods allowed according to each craft's requirements." 494 F.2d at 250. That no agreement on this issue was reached by the par-

ties is made clear by Mr. Adams' objections to the May decree and by his request for a hearing to establish shorter apprenticeship periods, both of which were overruled by the district court. Under our prior mandate, the district court should have permitted retention of the present apprenticeship period only if the record supported a finding of business necessity. The district court's subsequent finding of business necessity, however, cannot have been based on the record. We stated in *Pettway III* that "[t]he company has made no showing that the three and one-half to four years for apprenticeship . . . are periods required by business necessity," 494 F.2d at 250, and no new testimony or evidence was entered on the record subsequent to our prior opinion.

Under the circumstances, we must conclude that the court's finding of business necessity has no basis in the record. On remand, unless the parties can resolve this issue by agreement,[60] the court should hold an evidentiary hearing to establish appropriate apprenticeship periods for each craft consistent with our mandate in *Pettway III*.

2. *On-the-Job Training*

Eligibility for craft positions in pay groups 12 and 13 can also be acquired through the on-the-job training program. Prior to 1971, illegal testing resulted in the exclusion of blacks from the program. To remedy the effect of the testing requirement, which we found was carried forward by neutral, current practices, we held in *Pettway III* that "the requirement that bids from *within* the craft departments be given initial, primary consideration must fail in light of the proof demonstrating that a large majority of black employees have been excluded from these departments." 494 F.2d at 240 (emphasis in

[60]The parties, of course, are free to negotiate a settlement on this or any of the issues remaining on remand. We reiterate our comment in the introduction to Section III that any portion of the decree entered on remand which represents the agreement of the parties must be clearly denominated as such. The settlement should be accepted by the court only after Rule 23 procedural requirements have been fully satisfied. *See* subsection V(A) *infra*.

original). We also found that the seven year training period was "unnecessarily long" and not justified on the record by business necessity. We, therefore, ordered the period shortened unless business necessity could be demonstrated. Finally, we stated that "consideration should be given to broadening the qualifying experience on jobs outside craft departments" *Id.* at 250.

On remand the district court ordered that plant seniority, rather than departmental seniority, be utilized in administering the on-the-job training program. The court declined to order further changes in the trainee program, finding that the other contested elements of the program were justified by business necessity. *See* footnote 40 *supra.*

Appellants now allege that the district court failed to follow our prior mandate by continuing to allow the company to give initial preference to bids from within the craft departments. The company responds that the experience necessary to enter the on-the-job training program is only obtainable in positions within these departments. We agree with the company that the record supports the finding that positions within the present lines of progression in the craft departments are functionally related. *See* subsection III (C) (2) *supra.* We are unable to discern from the present record, however, which positions in the lines of progression are *necessary* prerequisites for entry into the trainee program and thus cannot evaluate the district court's finding that business necessity supports the requirement that bids from within the craft departments be given initial, primary consideration. To the extent that the district court's order gives automatic preference to incumbents of positions in the craft departments which are not necessary to enter the training program, the order is overbroad. On remand, the district court should make detailed findings concerning the operation of the on-the-job training programs and the necessity, if any, of giving preference to bids from particular positions within the department. These findings must be supported by evidence on the record. If the court concludes that preference for positions in the trainee program, as presently constituted, must

be given to employees within the department, it must then consider possible modifications of the program itself to ensure compliance with our prior mandate, which required that class members outside the craft departments be given an opportunity to enter craft positions through on-the-job training. 494 F.2d at 250 ("The requirement that bids from *within* the craft departments be given initial, primary consideration must fail . . .") (emphasis in original). The overwhelming majority of black employees traditionally have been excluded from the craft departments. Our validation of the lines of progression within those departments will make it extremely difficult for blacks outside the craft areas to obtain high level craft positions in the foreseeable future. This is true even though red circle rate retention will be available. *See* subsection III(D) *supra*. The on-the-job training program constitutes a logical vehicle for expediting the rise of class members to their rightful places within the craft departments, and within the bounds of business necessity, the court on remand must consider any reasonable proposal advanced by plaintiffs to modify the on-the-job training program to allow black employees presently excluded from the craft departments an opportunity to enter the program.

Appellants also argue that the district court ignored our mandate in *Pettway III* that "the length of the on-the-job training . . . should be shortened" unless the company proved that the seven year training period was required by business necessity. 494 F.2d at 250. We stressed in our prior decision that no such showing existed on the record at that time. *Id.* The court on remand, without any additional evidence before it on the record, nonetheless concluded that the seven year period was necessitated by business necessity. Because this conclusion has no basis in the present record, we are compelled to reverse. On remand the court must reconsider the length of the program in light of today's holding and our prior opinion, 494 F.2d at 250-51. Additional evidence may be considered on the record, but the limits on access to the on-the-job training program must be brought within the strictures of business necessity.

H. *Conclusion*

In summary, the injunctive relief portion of the decree framed below is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. On remand, an interim order should be entered forthwith requiring that all vacancies in the non-craft departments be posted plant-wide for bidding based on plant seniority. *See* subsection III (C) (3) *supra*. Where other modifications or revisions in compliance with this opinion can be effected without further evidentiary proceedings, these changes should also be set forth in the interim order.[61] The court should then hold evidentiary hearings as necessary to comply with the remainder of our mandate.[62] At this point in the proceedings the court may also, in the exercise of its discretion, provide ACIPCO a final opportunity to demonstrate business necessity for the reestablishment of portions of its present lines of progression in the non-craft departments. *See* subsection III (C) (3) *supra*. Following this evidentiary hearing the court should issue a final decree. Provisions in this decree should be accompanied by detailed findings of fact based on evidence in the record. While the court "need not indulge in exegetics, or parse or declaim every fact and each nuance and hypothesis," *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 516 (5th Cir. 1969), the "findings and conclusions we review must be expressed with sufficient particularity to allow us to determine rather than speculate that the law has been correctly applied." *Hydrospace-Challenger, Inc. v. Tracor/MAS, Inc.*, 520 F.2d 1030, 1034 (5th Cir. 1975). This is particularly important with respect to those determina-

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[61]In subsection III (D) *supra* we required the district court to provide full red circle wage rate retention to all eligible employees. This modification in the red circle provisions of the court's decree is one example of a revision that can be effected without further evidentiary proceedings.

[62]For example, in subsection III (E) *supra*, we ordered the district court to reconsider whether the subjective judgment of all-white superintendents operates to discriminate against black employees in the selection of supervisors. Evidentiary hearings may be necessary to comply with our mandate on this and similar issues.

tions which must be supported by a showing of business necessity.

The parties, of course, are free to negotiate a settlement on any or all of the issues remaining on remand. Any issue resolved through the negotiation process must be explicitly and specifically denominated as a settlement. Before accepting any such settlement, the court must ensure that Rule 23 procedural requirements have been fully satisfied.

IV. *Denial of Back Pay to Class Members Hired Subsequent to July 2, 1965; The Definition of the Back Pay Subclass*

In subsection I (C), *supra*, we determined that the exclusion of 1400 class members from the back pay subclass constituted the district court's own judgment and was not part of any settlement between the parties. The district court found "that no black employee employed subsequent to July 2, 1965 has suffered any economic loss due to the Company's testing and educational requirements or from any alleged discriminatory practice" (A 415) and therefore denied these class members back pay. In *Pettway III*, *supra*, we set out detailed instructions for determining entitlement to back pay. 494 F.2d at 258-263. Whether the substance of those guidelines was observed below is not apparent from the record. Furthermore, we are unable to determine from the record whether the evidence examined by the district court supports its conclusions. Under the circumstances we must vacate the court's denial of back pay to class members hired after July 2, 1965 and remand for further proceedings consistent with this opinion and other controlling authority. If on remand the district court determines that any particular group within the affected class is not entitled to back pay, "it must carefully articulate its findings and conclusions." *United States v. United States Steel Corp.*, 520 F.2d 1043, 1055 (5th Cir. 1975). *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 2373 n. 14, 45 L.Ed.2d 280 (1975).

To aid the district court on remand, we shall briefly summarize the legal requirements for determining entitlement to

back pay which we developed in *Pettway III* and subsequent cases. *See, e. g., Swint v. Pullman-Standard*, 539 F.2d 77, 102-03 (5th Cir. 1976); *United States v. United States Steel Corp., supra*, 520 F.2d at 1052-57; *Baxter v. Savannah Sugar Refining Co.*, 495 F.2d 437, 442-45 (5th Cir.), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1974).

This court has established a bifurcated approach to back pay determinations in class actions. At Stage I the *class* must demonstrate a prima facie case of employment discrimination. During this stage, it is improper to require any particular discriminatee to prove personal monetary loss. *United States v. United States Steel Corp., supra*, 520 F.2d at 1054-55; *Baxter v. Savannah Sugar Refining Corp., supra*, 495 F.2d at 443. Once the class has proven a prima facie case of discrimination, it is presumptively entitled to move into Stage II, where individual back pay claims are presented. *Pettway III, supra*, 494 F.2d at 259. The company may rebut this presumption and thereby prevent the class from moving into Stage II. In the instant case, the class proved its prima facie case of discrimination over four years ago, *id.* at 255-59, and on remand from *Pettway III* the district court properly provided the defendant an opportunity to rebut the presumption of entitlement to back pay.

The company's burden in seeking to rebut the presumption created by the class' prior prima facie showing of discrimination is substantial. As we explained in *United States Steel, supra*, the defendant must draw

> into substantial question the group's entitlement to move into Stage II claimant-by-claimant. In all likelihood the defendant's ability to raise substantial doubt about the group's entitlement will occur only rarely . We anticipate that the defendant would have to show convincingly, and with statistically fair exhibits, that a given group of discriminatees outearned, or at least earned as much as, a plant seniority-comparable group of whites during the discriminatory period.

520 F.2d at 1054.

We are unable to discern from the present record whether the company met this burden. The company points to raw statistical information contained in a computer printout of February 20, 1975, which, according to the company, demonstrates that "black and white employees hired since 1965 and of similar years of plant service in the same department have in general progressed to substantially equal higher rates of pay at the same time."[63] However, the record contains no analysis whatsoever of this data. The district court made no specific findings based on the computer printout and did not refer to the printout in explaining its holding. The only reference in the record to any critical examination of this data is found in the stipulation signed by the company's attorney and Mr. Adams which states that the company "made a study of a representative sample of black employees" hired during and after 1965 and determined that these employees enjoyed earnings comparable to similarly situated whites. "[S]uch determination was made known to the Court." We note that Mr. Adams never agreed with the conclusion reached by the company's analysts. It is more than a little troubling that the study itself was not entered into the record. Indeed, the stipulation suggests that the study itself was never presented to the court. The district court's own judgment may not rest on such a flimsy basis.

While we will not intrude on the factfinder's role of analyzing and tabulating the raw statistics in the first instance, we do pause to note that appellants' arguments regarding the appropriate conclusions to be drawn from the data deserve careful consideration. On remand the district court should analyze on the record the contentions to both parties regarding these statistics, bearing in mind that the burden is on the defendant to show "convincingly and with statistically fair exhibits" that black employees hired after June 1965 have suffered no eco-

[63]The printout classifies each company employee by department, and provides the following information: name, employment date, salary as of February 20, 1975, sex, and race. Apparently, only persons currently employed as of February 20, 1975 were included in the printout, and thus the printout provides no information on those class members no longer employed with the company on that date.

nomic loss as a result of the company's discriminatory practices. *United States Steel Corp., supra*, 520 F.2d at 1054.

The district court on remand should also consider the limited use that the defendant makes of these statistics. Defendant relies on its statistics as a basis for comparisons of black and white employees *in the same department*. Yet in *Pettway III* we stressed that "those members of the class, either currently situated or present prior to March 31, 1971, within the predominantly black departments . . . are eligible for back pay for the period 1965 to 1971 because of the restrictive effect of the discriminatory testing on their intra-department and *inter-department advancement*." *Pettway III, supra*, 494 F.2d at 258 (emphasis supplied). We also stated that back pay is appropriate even for class members in predominantly white departments because testing limited their advancement once they were within the department and because some "were inhibited by the testing *from transferring to these departments at an earlier time. . . .*" *Id.* (emphasis supplied). The company does not even attempt to argue that its comparison of black employees with white employees within the same department refute the prima facie showing found in *Pettway III*, 494 F.2d at 258, of lost departmental transfer opportunities prior to 1971. On remand the company bears the burden of providing "convincing" evidence that no economic loss was caused by these lost departmental transfer opportunities. Finally, the company bears the same burden regarding "those workers in the class [who were] denied supervisory positions or entrance into the apprenticeship and on-the-job training."[64] In *Pettway III* we stated that these class members are also eligible for back pay. *Id.* at 258-59.[65]

[64]In considering these groups within the class, the court is free to create subclasses to aid its determination. *See United States Steel Corp., supra*, 520 F.2d at 1054, 1056.

[65]The company argues that because of its time progression interval requirement for advancement within pay groups 1-8, employees hired after July 1965 could not have suffered economic loss prior to the March 1971 elimination of all testing and educational requirements for promotion to pay groups 9-16 and for admission to apprentice and on-the-job training

Even if the company satisfies its burden of demonstrating that a given group of class members earned as much as white employees with comparable plant seniority, the class, or members of any definable group within the class, may still claim back pay at Stage II

> if the class representative can make a reasonable argument that the exhibit is distorted, or that a significant number of members might have earned even more than their white contemporaries but for the continued effects of discrimination. Positive proof by each member of the group is not necessary at that point. The representative need only raise on behalf of the class a reasonable inference of "cognizable [economic] deprivations to it as a class," *Baxter, supra,* 495 F.2d at 443, "based on racial discrimination by the employer [or union] in the employment relationship." *Johnson v. Goodyear, supra,* 491 F.2d at 1375. This inference justifies the presumption which entitles the group to move into Stage II.

United States Steel Corp., supra, 520 F.2d at 1054-55.[88] In the event that the court in following this mandate again decides that any particular group within the affected class is not entitled to move into Stage II, it must carefully articulate its findings and conclusions. *Id.* at 1055.

If the district court concludes that some or all of these class members are entitled to move to Stage II, it should follow the burden-of-proof rules respecting individual claims set forth in *Pettway III, supra,* 494 F.2d at 259-63; *United States Steel Co., supra,* 520 F.2d at 1055-1057; *Baxter v. Savannah Sugar Refin-*

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positions. The company further alleges that many of the 1400 class members who were denied back pay left the company after an insufficient period of service to have suffered any economic loss. The briefs of appellants and the EEOC purport to refute these arguments. Given the present state of the record, consideration of these points is best left to the district court on remand. Our own review on a subsequent appeal would then benefit from the district court's development of the record and articulation of reasons for its conclusions.

[88]We recognize that this "bifurcated approach" might be more appropriately denominated in terms of three or more stages. However characterized, Stage I permits an initial presumption of entitlement which the company may rebut and the class may reinforce by evidence.

ing Corp., 495 F.2d 437, 443-45 (5th Cir.), *cert. denied*, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1974) and *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379-80 (5th Cir. 1974). In *Pettway III* we stressed that "the *maximum* burden that could be placed on the individual claimant in this case [in Stage II] is to require a statement of his current position and pay rate, the jobs he was denied because of discrimination and their pay rates, a record of his employment history with the company that qualified or would have qualified him for the denied positions, and an estimation of the amount of requested back pay. . . . The burden then shifts to the company to challenge particular class members' entitlement to back pay." 494 F.2d at 259-60 (emphasis in original).[67] Two basic principles must be followed in computing the back pay award: "unrealistic exactitude is not required and uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer." *Id.* at 260-61.[68]

The district court on remand may, of course, consider the class-wide approaches recommended in *Pettway III* and *United States Steel* for managing the "quagmire of hypothetical judgment" imposed by this complicated back pay determination. 494 F.2d at 261-62. However, in allowing the district court to

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[67]If Stage II is reached on remand, and the court chooses to proceed on an individual-by-individual basis rather than utilize one of the class-wide approaches suggested in *Pettway III*, 494 F.2d at 261-63, notice to class members explaining this obligation to provide information to the court would be appropriate. *See* Fed.R.Civ.P. 23(d)(2).

Judge Wisdom's concurring opinion in *Robinson v. Union Carbide Corp.*, 544 F.2d 1258, 1261 (5th Cir. 1977) discusses standards for Rule 23(d)(2) notice in a similar context. The same standards are applicable here. *See id.* at 1265. Such notice is important in this Rule 23(b)(2) class action because class members who do not supply the requested information would be precluded from relief in this action, but would be bound by the judgment and precluded from pursuing individual relief in another suit. *See* subsection V(B)(1) *infra*.

[68]We also stressed in *Pettway III* that "the ingredients of back pay should include more than straight salary. Interest, overtime, shift differentials, and fringe benefits such as vacation and sick pay are among the items which should be included in back pay." 494 F.2d at 263.

avoid the quagmire associated with the uncertain terrain of individual determinations, we did not in *Pettway III* extend an invitation to abandon the marshes altogether. While the physical and fiscal limitations of the court in granting and supervising relief make the task a difficult one, they must not be allowed to preclude an award of back pay to each and every aggrieved employee.

In conclusion, we express full confidence in the ability of the district court on remand to achieve a result consonant with the important compensatory purposes of back pay and the legal requirements articulated in *Pettway III* and subsequent cases. The court is free to appoint a master to assist with Stage II, and, as always, the parties are free to negotiate a settlement.

V. *The Back Pay Settlement*

Those appellants who were members of the back pay subclass raise numerous objections to the district court's approval of the back pay settlement. Their primary contention is that the district court abused its discretion in approving the settlement in the face of widespread dissent by the class representatives and a large majority of the subclass. Appellants also contend that the district court failed to adhere to the required procedures for passing on a proposed consent decree. Finally, appellants argue that the time limitation imposed by the district court for opting into the settlement unfairly impinged on the awardees' rights to appellate review. They request that if the settlement is invalidated, subclass members who opted into the settlement be given an opportunity to disaffirm their award and participate in the proceedings on remand. They ask in the alternative that if the settlement approval is affirmed, awardees who opted out of the subclass by not cashing their back pay checks be given the opportunity to reconsider their decision.

A. *Settlement approval*

1. *Scope of Review*

Appellants' objections to the back pay decree raise diffi-

cult and provocative questions concerning the use of a settlement in resolving class action disputes. Before proceeding with our examination of appellants' argument, it is appropriate that we outline the rules of law governing the parameters of our review. We have stated many times that conciliation and voluntary settlement are the preferred means for resolving employment discrimination disputes. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976); *Pettway III*, *supra*, 494 F.2d at 258; *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968). We have also recognized, however, that the rights and interests of each class member must be considered in assessing the fairness of the proposed compromise. *See Cotton v. Hinton*, 559 F.2d 1326, 1330-32 (5th Cir. 1977).

The judgment of the district court in approving a settlement entered into by the plaintiff class will not be overturned absent a showing that the district court abused its discretion in approving the settlement. *Id.* at 1329; *Allegheny-Ludlum Industries, Inc., supra*, 517 F.2d 849-50. But in exercising that discretion the district court must carefully consider certain factors and comply with certain procedural safeguards to ensure that the settlement is in the interests of the class, does not unfairly impinge on the rights and interests of dissenters, and does not merely mantle oppression. Our task on appeal is to ensure that the proper procedures were followed below and that the district court did not abuse its discretion in approving the settlement.[69]

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[69]In determining the fairness, adequacy, and reasonableness of a proposed settlement, neither the trial court nor the appellate court on review should reach ultimate conclusions on the issues of fact and law underlying the dispute. *See Cotton v. Hinton*, *supra*, 559 F.2d at 1330. While the trial court must "undertake an analysis of the facts and law relevant to the proposed compromise, [focusing his inquiry] upon the terms of the settlement," *id.*, compromise is the essence of a settlement, and the settlement need not accord the plaintiff class every benefit that might have been gained after full trial. Because a settlement may compromise the rights and interests of class members, the procedural requirements for approving

2. *Objections from the Subclass*

Appellants' primary contention is that the district court abused its discretion in approving the settlement over the objections of the class representatives and a large majority of the subclass. In the instant case all three active class representatives objected to the proposed settlement. The elected members of the Committee for Equal Job Opportunity each objected to the settlement. Even assuming that the figures proffered by the defendant are correct, 511 members of the 841 person subclass formally objected to the settlement by signing the June 20, 1975 objections to the decree and notice of intent to appeal. *See* footnote 3 *supra*. We may assume that a large percentage of these objectors were workers currently employed in 1975, since no notice of the May decree or June judgment was sent to class members who had left the company prior to May 1975. The back pay checks were not mailed until June 27, and for many this constituted the first official notification of the award. Thus the district court should have known that the number of dissenters to the settlement might have been even greater if class members no longer employed by ACIPCO had had the opportunity to object. Indeed, an additional 78 persons who did not originally object to the settlement later voiced their objections by refusing to cash their back pay checks. *See* footnote 3 *supra*. If we treat these 78 subclass members as objectors of whom the district court should have been aware, the number of objectors climbs to 589 or 70 percent of the subclass.[70]

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a settlement and the substantive rules governing the exercise of a trial judge's discretion are of crucial importance.

[70]Under the terms of the district court's opt-in opt-out procedure, 52% of the subclass ultimately opted out by refusing to cash their checks. 511 subclass members, or 61% of the subclass, objected to the settlement by signing the June 20 objections. This figure, augmented by the 78 subclass members who opted out by refusing to cash their checks but did not sign the June 20 objections to the decree, results in the 70% figure which we consider the most appropriate measure of subclass disapproval in the peculiar circumstances of this case. *See* footnote 3 *supra*.

We deem it appropriate to consider the 78 subclass members as dissenters whose dissatisfaction with the back pay award should have been considered by the district court for two reasons. First, the district court was

The black letter law in this circuit teaches us that in assessing the fairness of a proposed compromise, the number of objectors is a factor to be considered, but a settlement can be

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aware that a substantial portion of the subclass had not cashed their back pay check at the time of the October 30 hearing, because its November 20 final order extended the deadline for opting into the subclass until December 15, 1975. Equally important, subclass members received no notice that the back pay decree had been reached by settlement or that each subclass member had a right to object to the proposed settlement. Such notice is required by Rule 23(e). *See Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832, 835 (9th Cir. 1976). Thus the district court also should have been aware of the possibility that subclass members other than the 511 who signed the June 20 objections might have expressed dissatisfaction with the decree if, as required by Rule 23, they had been given the opportunity to do so.

ACIPCO asserts that the May 21, 1975 letter from the company to all class members then employed by ACIPCO constitutes sufficient Rule 23(e) notice to subclass members of the proposed back pay settlement. The letter, which summarized the May 14 decree, was accompanied by a copy of that decree. The company points to paragraph 15(c) of the May decree, which provides:

> The Court reserves for later determination the question of whether objections and exceptions [to the back pay award] shall be heard and decided by the Court or shall be referred to a Special Master. (A 78)

This sentence, hidden in the middle of a lengthy and complicated decree, does not constitute adequate Rule 23(e) notice. First, the May 21 letter was sent only to class members presently employed by ACIPCO. Thus subclass members who had left the company prior to May 21, 1975 did not receive this notice. Furthermore, the fact that the company's letter was accompanied by a copy of the May decree makes clear that no settlement could have been contemplated, since the settlement at issue was embodied only in the subsequent June 12 judgment. It thus is not surprising that the sentence relied on by ACIPCO utterly fails to inform the subclass of their rights to raise objections to the settlement or of the options that are open to them in connection with the settlement approval proceedings. *See Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975); *Mandujano v. Basic Vegetable Products, Inc., supra*, 541 F.2d 835.

We stress the failure of subclass members to receive notice of any opportunity to object to the settlement because this fact should have influenced the district judge's perception concerning the degree of dissatisfaction within the subclass. The district judge should have realized that many back pay awardees, particularly those no longer employed by ACIPCO on May 21, 1975, lacked realistic opportunity to sign the June 20 objections to the decree because of the company's failure to send adequate notice. Under the circumstances, we deem it appropriate to treat the 78 subclass members who did not sign the June 20 objections but who later refused

fair notwithstanding a large number of class members who oppose it. *Cotton v. Hinton, supra,* 559 F.2d at 1331. *See Flinn v. FMC Corp.,* 528 F.2d 1169, 1173 (4th Cir. 1975), *cert. denied,* 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976); *Bryan v. Pittsburgh Plate Glass Co.,* 494 F.2d 799, 803 (3rd Cir.), *cert. denied,* 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d 146 (1974). The trial court is entitled to take account of the judgment of experienced counsel for the parties. *Cotton v. Hinton, supra,* 559 F.2d at 1330.

These rules, however, do not mean that the approval of plaintiffs' counsel will always be determinative or that the number of objectors to the settlement is not a significant consideration. We have already discussed the potential conflict of interest between an attorney and a class. *See* subsection II(B), *supra.* As Judge Friendly aptly noted in *Saylor v. Lindsley,* 456 F.2d 896, 900-01 (2nd Cir. 1972), in a substantial number of class action cases the lawyer may be more prone to settle than the class. While the natural bias toward relatively small settlements and large fee awards in class actions may be controlled to a certain extent by the procedural requirements for district court approval of the settlement proposal, as a practical matter the lawyer's discretion remains great. *See* K. Davis, Class Action: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. of Legal Studies 47, 57-58 (1975).[71] Consequently,

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to cash their back pay checks as having voiced their objections to the court.

We note in passing that even this 70% figure may understate the actual level of dissatisfaction by failing to consider those members of the subclass no longer employed by ACIPCO who received no notification of the appeal and cashed their checks, despite possible dissatisfaction, because they were unaware of any opportunity to voice their dissatisfaction.

[71]Here appellants allege that such a conflict of interest in fact did arise when Mr. Adams negotiated his fee simultaneously with his settlement negotiations. Such a course of action, if it indeed occurred, would weigh heavily against the district court's decision to accept the settlement, particularly in light of the widespread disapproval of the settlement among the class. The record, however, does not indicate that such simultaneous negotiations actually took place. The appellants correctly point out that they attempted to question Mr. Adams during the October 1975 hearing

in reviewing a proposed settlement the district court should always consider the possibility that an agreement reached by the class attorney is not in the best interests of the class. This is particularly true where, as here, the class attorney settles the case without the participation or consent of the active class members.

We recognize that discretion on the part of the class attorney often is an unavoidable fact of class action life. We noted in our examination of the appealability question that the traditional notion of the "client" deciding important litigation questions is often problematic in the class action context because of the difficulty in identifying the client. *See* subsection II (B), *supra*. The class itself often speaks in several voices. While there is disagreement among the class members concerning an appropriate course of action, it may be impossible for the class attorney to do more than act in what he believes to be the best interests of the class as a whole. If the attorney's decision in the face of such disagreement affects each class member more or less equally, and no allegation is made that the rights of a definable minority group within the class were sacrificed for the benefit of the majority, the attorney's views must be accorded great weight and the trial judge's decision to ratify the attorney's action will seldom be overturned.

At least in the context of a proposed back pay settlement, however, at some point objections from the class may become so numerous that in a very real sense it can be said that "the class" has not agreed to the proposal, that counsel's perceptions of the best interests of the class are faulty, and that approval of the settlement by the district court constitutes an

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concerning the events leading up to the decree. The trial court refused to allow such questioning. In other circumstances, the trial judge's failure to develop a record or make findings of fact on the question of simultaneous negotiations might require a remand for a factual determination. *See Cotton v. Hinton*, *supra*, 559 F.2d at 1331; *Mandujano v. Basic Vegetable Products, Inc.*, *supra*, 541 F.2d at 835-36. In light of our resolution of the other back pay issues, however, we need not rely on the presence or absence of such simultaneous negotiations. Accordingly, such a remand is unnecessary.

abuse of discretion. No simple percentages are determinative, of course, and each case must turn on its own facts. While recognizing the difficult task facing the district court in the absence of crisp guidelines and well-articulated standards for review of a settlement in the face of significant dissent from the class, we are firmly convinced that under the peculiar circumstances of this case, approval of the settlement in the face of such widespread dissent evidenced below constituted an abuse of discretion. The district court should not have placed its imprimatur upon this agreement.

One significant factor in our decision is the unanimous disapproval of the back pay settlement by the active named plaintiffs. To be sure, the assent of named plaintiffs is not a prerequisite to the approval of a settlement. *See Flinn v. FMC Corp., supra,* 528 F.2d at 1174 n.19 (all three class plaintiffs dissented; settlement approval affirmed); *Saylor v. Lindsley, supra,* 456 F.2d at 899. But where, as here, the class representatives have provided exceptional representation in the past and there is no showing of any conflict of interest, either actual or potential, between the representatives and the class, *see* subsection II(B), *supra,* and where, as here, not a single subclass member has stepped forward to object to the named plaintiffs' representation or prosecution of this appeal, we must accord great weight to the views of the class leadership. *See Mandujano v. Basic Vegetable Products, Inc.,* 541 F.2d 832 (9th Cir. 1976) (Fact that five of nine named plaintiffs opposed the settlement given great significance in holding that settlement approval constituted an abuse of discretion).

We also attach significance to the fact that each elected member of the Committee for Equal Job Opportunity voiced an objection to the settlement. We noted on the previous appeal that this "intense organization" was formed by a majority of the company's black employees in 1965 and has maintained a continued and vigorous participation in this litigation. 494 F.2d at 233-34 and n.53.

Of still greater importance to our decision is the opposition of 70% of the subclass to the settlement. We recognize

that a settlement can be fair notwithstanding a large number of objectors. *Cotton v. Hinton, supra*, 559 F.2d at 1331. Indeed, in *Cotton v. Hinton*, we affirmed a Title VII settlement approval where a significant percentage of the class objected to the decree.[72] *See* also *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3rd Cir. 1974) (approval of back pay settlement affirmed despite objections from 20% of the class). However, the significance of this factor necessarily will vary depending on the issue that is settled and the amount of the opposition. *Cotton v. Hinton* involved a settlement which provided for broad injunctive relief and an unlimited back pay fund to ensure that every injured class member would be adequately compensated. The actual award to each claimant was left for further proceedings.[73] Here, on the other hand, the dispute is over the sufficiency of the total amount of damages awarded to the class, and 70% of the subclass objected. While majority rule is not the test in every case, in the context of determining the total back pay award majority sentiment becomes highly relevant. We stress that this is not a dispute over the *allocation* of a settlement fund, with respect to which the court should not allow a majority, no matter how large, to impose its decision on the minority. In such circumstances, objection by a few dissatisfied class members should trigger close judicial scrutiny to ensure that the burden of the settlement is not shifted arbitrarily to a small group of class members. Here the dispute centers around the sufficiency of the settlement fund. Each subclass member's interest in the size of this fund is substantially

[72]The class in *Cotton* was composed of all present and former black employees at the defendant's plant. The court's opinion does not indicate what percentage of this class objected to the consent decree. At one point the court noted that counsel for the objectors purported to represent 187 then-employed black employees. 559 F.2d at 1329. Later the Court observed that counsel "purported to represent a class comprised of almost 50% of the active employees at U.S. Pipe." *Id.* at 1333. Because the opinion reveals neither the percentage of blacks among the active employees nor the size of the class, we are unable to arrive at any meaningful percentage figure indicating the degree of class dissatisfaction in that case.

[73]We also note that in *Cotton* there was no allegation that the named plaintiffs objected to the settlement.

the same and there are no conflicts of interest among definable groups within the subclass. The decision to approve this settlement thus may appropriately be described as an intrinsically "class" decision in which majority sentiments should be given great weight.

When viewed from this perspective, we must conclude that the district court was required to withhold its approval of this agreement. All of the active named plaintiffs, all of the elected representatives on the Committee for Equal Job Opportunity, and 70 percent of the subclass objected to the settlement. Attorney Adams agreed to the award without the apparent consent of any of the active class members or any significant portion of the subclass. If 100 percent of the subclass had objected we could say with complete confidence that "the class" has not settled its claim. At least under the limited circumstances of this case, our confidence is not shaken when the figure is reduced to 70 percent.[74] Where such a large percentage of the class objects there must be something, not necessarily rotten in Denmark, but unfair to the principality consisting of a class as a whole. The district court abused its discretion in approving this back pay agreement.

Our resolve to reverse the district court's approval of the settlement is strengthened by considerations of judicial economy. In *Cotton v. Hinton, supra*, we recently commented that "[i]n these days of increasing congestion within the federal court system, settlements contribute greatly to the efficient utilization of our scarce judicial resources." 559 F.2d at 1331. Where the proportion of the class which objects to the settlement approaches 70%, considerations of economy counsel *against* settlement approval. The greater the number of dissatisfied subclass members, the greater the burden placed on the judicial

[74]Our use of this 70% figure as the appropriate measure of dissatisfaction with the settlement among the members of the subclass in no way implies that our result would be different if dissent were measured solely in terms of the 61% of the subclass which formally objected to the settlement by signing the June 20 objections to the decree. We leave open the question of whether, under similar circumstances, the objections of 61% of a back pay subclass would be sufficient to invalidate a settlement.

system by subclass members who opt-out of the settlement and pursue their individual claims. After more than 10 years of litigation in this class action, the strain on the judicial system would be reduced by remanding the case for a final resolution of the dispute satisfactory to, or binding upon, the entire subclass, rather than affirming the lower court's approval of a settlement which was opposed by 70% of the subclass and actually rejected by the 52% of the subclass which ultimately opted out of the settlement.

3. *Procedural Claims*

Appellants also raise a number of procedural objections to the settlement approval. They argue that subclass members not employed by the defendant in May 1975 were not given notice of the proposed settlement as required by Rule 23(e),[75] that the dissenters were denied discovery rights, and that the dissenters were denied an opportunity to present adverse claims. In light of our decision to reverse the district court's approval of the back pay settlement, we need not, and do not, decide whether the failure to provide notice to all subclass members as required by Rule 23(e), *see* footnote 75 *supra*, or the denial of discovery to the dissenters constitute independent grounds for reversal.[76] Given the sparse record on appeal in regard to appellants' allegations that they were denied an oppor-

[75]Rule 23(e) provides that notice of a "proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

[76]We hope that the parties will be able to settle their differences on remand. In their briefs appellants remark that perhaps an agreeable settlement could be worked out if they were given the opportunity to develop the facts through discovery. The district court on remand should consider this possibility for resolving the dispute. Of course, the scope of the discovery to be conducted in each case rests with the sound discretion of the trial judge. *Cotton v. Hinton, supra*, 559 F.2d at 1333.

If the parties are able to reach an agreement on the back pay issue, the district court should provide full Rule 23(e) notice to all subclass members still eligible for back pay whether or not they are presently employed by the defendant. *See, e. g., Mandujano v. Basic Vegetable Products, Inc., supra*, 541 F.2d at 835-36.

tunity to raise fully their objections to the settlement at the October 30 hearing, we decline to address this issue as well. However, because on remand the parties once again may choose to resolve the back pay question through the settlement process, we deem it advisable to add a few general observations concerning the procedure utilized by the district court in approving the settlement.

The October 30 hearing, at which the objectors were represented, was held months after the back pay settlement was accepted by the court as its June 12, 1975 "Final Judgment". Even if appellants were given a fair opportunity to develop their objections at the October 30 hearing,[77] by this time the back pay checks had already been issued and a large number of subclass members had accepted their award. This procedure does not comport with the requirements of Rule 23. Rule 23(e) requires that the trial judge provide notice of a proposed settlement to the class and extend to any objectors an opportunity to voice their objections *before* the settlement is approved. *Cotton v. Hinton, supra,* 559 F.2d at 1331. The trial court must then "examine the settlement in light of objections raised and set forth on the record a reasoned response to the objections including findings of fact and conclusions of law necessary to support the response." *Id., citing Mandujano v. Basic Vegetable Products, Inc., supra,* 541 F.2d at 835-36. Here the settlement was approved in the June 12 judgment authorizing the tender of back pay awards to individual subclass members. The hearing to develop objections was held *after the fact.* In could not have been held to consider whether to approve the settlement when approval had already been rendered months earlier. If any of the issues remanded to the district court for

[77]Appellants maintain that the October 30 hearing was called solely for the purpose of developing a record of the proceedings leading to the entry of the court's final order, and that the issue of objections by the class was not to be considered until a second hearing. This second hearing was cancelled by the court after the October 30 hearing was concluded. We will assume for purposes of this discussion that appellants were given a sufficient opportunity to develop objections at the October 30 hearing, although the record is at best equivocal on this point.

further proceedings are resolved through the settlement process, the court must follow strictly the procedures outlined above for evaluating the proposed agreement.

4. *Summary*

In conclusion, the district court's approval of the back pay decree must be reversed. In light of objections from the 70% of the back pay subclass, including all the active class representatives and each member of the Committee on Equal Job Opportunity, we hold that the district court abused its discretion in approving the back pay settlement.

B. *Opt-in, Opt-out Procedures*

Appellants' final argument on appeal is that the time limitations imposed by the district court for opting into the settlement unfairly restricted the awardees' rights to appellate review. Consequently, appellants ask that those awardees who opted into the settlement be given the opportunity to reject their awards and participate in further back pay proceedings on remand. This issue is addressed in subsection V(B)(2) *infra*. In light of our decision to invalidate the settlement reached below, it is unnecessary to reach appellants' alternative contention that if the settlement is upheld, awardees who opted out of the subclass should be given an opportunity on remand to accept their prior award. Nonetheless, as was true with respect to the procedural aspects of the settlement approval, an important issue with regard to those who opted out of the subclass could recur on remand. In the hope of precluding any necessity for another appeal on this issue, we shall briefly examine the consequence to the awardees of opting out of the subclass.

1. *Opting Out of the Subclass*

As we discussed in subsection II(C), *supra*, the district court's November 20 final order provided that the back pay judgment would become null and void as to those subclass

members who failed to cash their checks before December 15, 1975. These individuals were relegated to independent lawsuits against the company to recover back pay damages. Awardees who opted into the settlement by cashing their checks thereby released the company of all liability arising from any Title VII violations occurring on or before May 14, 1975.[78]

We are particularly concerned with the provision in the district court's November 20 final order that those subclass members who failed to opt into the settlement would be deemed to have opted out of this class action altogether for purposes of determining entitlement to back pay and would be relegated to separate lawsuits. *See* discussion in subsection II (C) *supra*. In *Pettway III* we stated that the district court could allow claimants who were dissatisfied with their pro rata share of a class-wide back pay award to "opt out in order to prove that they were entitled to a larger portion." 494 F.2d at 263 n. 154. While this language is possibly subject to more than one interpretation, and we can understand the district court's dilemma

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[78]The June 12, 1975 final judgment provides that

> The Court approves as complying with Section 15-D of the Decree dated May 14, 1975, the Company imprinting on the back of its checks used in paying the back pay awarded by this Judgment the words, "I understand that my endorsement of this check constitutes a release of liability in the form specified in Paragraph 15-D of the Decree dated May 14, 1975," and such endorsement shall for all purposes bind the endorser the same as if the endorser had executed a written release containing the terms and provisions expressly set out in said Paragraph 15-D of the Decree of May 14, 1975.

Paragraph 15-D of the May 14, 1975 decree states

> D. It shall be a condition to the receipt of any back pay that the recipient execute a release, in a form to be approved by the Court, of any claims against or liability of the Company, its officers, directors, agents, employees, successors and assigns, resulting from any violation or alleged violation based on race or color, occurring on or before the date of the entry of this Decree, of any equal employment opportunity laws, ordinances, regulations, or orders, including but not limited to Title VII of the Civil Rights Act of 1964 as amended, 42 USC § 2000e *et seq.*, the Civil Rights Act of 1866, 42 USC § 1981 *et seq.*, and any other applicable federal, state, or local constitutional or statutory provisions, orders or regulations.

in construing our holding, the context of our remarks[79] makes it clear that we intended that dissatisfied claimants be given an opportunity to prove entitlement to a larger individual award *in the same* lawsuit. Indeed, we have recently commented that opting out of the lawsuit altogether after a back pay settlement is not permitted in 23(b)(2) class actions. *Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721 (5th Cir. 1976). *See also United States v. United States Steel Corp.*, 520 F.2d 1043, 1053 (5th Cir. 1975). In *Sagers* we were faced with an agreement between the named class plaintiff and the defendant which contemplated that unnamed class members not awarded back pay could assert their back pay claims in individual actions. We stated that

> This Court held in *United States v. United States Steel Corp.*, 5 Cir. 1975, 520 F.2d 1043, 1053, et seq., that back pay claims of individuals represented in a class action, must be asserted in that action or be forever barred. . . . [U]nnamed class members, *if not afforded monetary relief in later proceedings in this action*, will be forever precluded from asserting such claims.

529 F.2d at 736 (emphasis supplied).

See also Cotton v. Hinton, supra, 559 F.2d at 1333-4, 1338 (Consent decree establishing the right of dissatisfied claimants "to litigate [the] back pay claim in this action under pendent jurisdiction" consistent with *United States Steel Corp., supra.*) Thus on remand if another settlement of the back pay dispute

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[79]Footnote 154 followed our discussion of the use of a comparability formula for determining a gross back pay award for the class. We reproduce the footnote in full:

> In other words, the total award for the entire class would be determined. At that point, individual claims would be calculated on pro rata shares for those workers of similar ability and seniority claiming the same position, possibly eliminating the necessity of deciding which one of many employees would have obtained the position but for the discrimination. Claimants dissatisfied with their portion of the award could be allowed to opt out in order to prove that they were entitled to a larger portion. Cf. Fed.R.Civ.P. 23(d)(2); *Protective Committee v. Anderson*, 390 U.S. 414, 435, n. 17, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968). 494 F.2d at 263 n. 154.

is reached, the district court should provide those claimants who decide to opt-out of the settlement with an opportunity to assert their individual claims in this action.[80]

2. *Rights of Claimants who Opted into the Settlement*

We now reach appellants' contention that those awardees who opted into the settlement be given the opportunity to reject their awards and participate in further back pay proceedings on remand. The court's November 20 order required awardees wishing to opt into the settlement to do so by December 15, 1975 or be deemed to have opted out of the subclass. This created a dilemma for dissatisfied subclass members, who were faced with the equally unpalatable alternatives of opting into a possibly invalid settlement or being relegated to individual lawsuits. A decision to opt into the settlement by endorsing the back pay check and thereby releasing the company of all liability for past discrimination might preclude entitlement to a share in a new agreement or award if the settlement were invalidated on appeal. On the other hand, a decision to opt-out of the subclass by failing to cash the tendered check would create the possibility of receiving no back pay award if the appeal were unsuccessful and an individual lawsuit proved unrealistic. As we have previously noted, the opportunity to prove individual damages, even in the same lawsuit, often is not a viable substitute to participation in a lawful settlement.

The procedure adopted by the district court, by requiring claimants to choose whether or not to opt into the settle-

[80]This requirement is consistent with the policies of Rule 23. When individual claims are asserted in the same action, the class attorney, who is familiar with the facts and the progress of the litigation, will be able to present the claimant's case. If relegated to a new suit, the individual might be unable to obtain counsel to prosecute his action when the amount of individual damages is relatively small. The requirement also conserves judicial resources by ensuring that the same judge who is already familiar with the case will rule on the merits of the individual claim. By obviating the need to bring a new lawsuit, the expense of litigating the new individual claim is reduced. This procedure also commends itself because the individual claim generally will be resolved more quickly. ***But see Pettway III* and *IV*.**

ment *before* they could exercise their right to appellate review, unfairly burdened the rights of awardees to appeal the settlement and thereby significantly undermined one of the most important procedural protections associated with the approval of a settlement. We hold that the ability of subclass members to opt into a back pay settlement may not be terminated before a final determination of the propriety of that settlement is made.[81]

Those subclass members who were dissatisfied with their award but who nonetheless cashed their back pay checks were denied the opportunity to appeal before choosing whether or not to opt into the settlement. Accordingly, the 399 subclass members who opted into the subclass must be given the opportunity on remand to reject their awards and participate in further back pay proceedings.[82]

If, after further proceedings on remand, the litigants are able to settle their back pay dispute, the period during which awardees may opt into the settlement must remain open at least

[81]In *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3rd Cir. 1971), the court read an ambiguous opt-in provision "to mean that disbursement of the settlement fund would await a final judgment which could not be appealed." The court commented that "[a] serious public policy question would be presented if the notice were construed to require a waiver of the right to appeal as a condition to opting in." 453 F.2d at 32.

Consent decrees approved in this circuit have also provided that back pay shall become available to eligible employees only upon exhaustion of all appellate proceedings. *See, e. g., United States v. United States Steel Corp.*, 520 F.2d 1043, 1056-57 (5th Cir. 1975).

[82]We recognize that some or all subclass members might receive a smaller back pay award on remand than their present share of the settlement. The district court is free to consider any reasonable alternative for ensuring that the company is able to collect from awardees who disaffirm their awards the difference between their present award and the amount which may be awarded after further proceedings. For example, awardees could be required to post a bond, in form, substance, and with surety or sureties as required and approved by the court, in order to disaffirm their present award. Of course, each of the 399 awardees who opted into the settlement should be provided notice of their right to disaffirm their award and participate in further back pay proceedings. This notice should fully explain the awardee's rights and the proper procedures for exercising them.

until the dissenters have had the opportunity to prosecute an appeal. *Ace Heating & Plumbing Co. v. Crane Co., supra.* This is not to say that subclass members may not be given the opportunity to opt into the settlement and receive their award before the district court's final order becomes non-appealable.[83] We do not require individuals who are satisfied with their share of the settlement fund to wait possibly for years until an appeal is completed before receiving their award.[84]

3. *Conclusion*

On remand the court should reformulate the back pay subclass to include the 442 individuals who declined to accept the back pay tender and any other awardees who disaffirm their award in compliance with the procedures to be established by

[83]It is, however, within the court's discretion to withhold all payments until a non-appealable order exists. In some situations the defendant may not wish to distribute settlement funds while an appeal is pending. *See United States v. United States Steel Corp., supra; Ace Heating & Plumbing Co. v. Crane Co., supra.* Such a provision in the settlement agreement is permissible.

[84]We recognize that where claimants are given the opportunity to opt into a settlement before an appeal can be prosecuted and most of the subclass members choose to do so, the few dissenters who appeal can receive only limited relief even if their appeal succeeds. For example, if 95 members of a 100 member subclass opted into a settlement, the 5 appellants would, as a practical matter, be relegated to individual claims on remand even if they were successful in overturning the settlement on appeal. Where the district court has already provided for the examination of these individual claims through the opt-out device recommended in footnote 154 of *Pettway III*, the few individual dissenters would be well advised to pursue this remedy before considering an appeal, since the probable result of even a successful appeal would be to require such individual determinations in any event. On the other hand, where the district court does not provide an opt-out device for dissenters, even when the number of dissenters is small the right to appeal is essential. An appellate court which determined that the settlement illegally compromised the rights of the dissenters and was therefore invalid could then remand the case for further proceedings to establish appellants' individual damages.

The situation with regard to the viability of appeal changes dramatically, however, when a sizable portion of the class does not opt into the settlement. In such circumstances, if the back pay settlement is held invalid on appeal, a classwide remedy remains a viable alternative on remand.

the district court. A number of options are then open to the court. Appellants in their brief indicate that if provided an opportunity for discovery and hearings to evaluate the adequacy of the settlement, the subclass members might be willing to accept their individual awards. In its discretion the court may wish to permit such discovery. The court might also encourage further settlement negotiations to arrive at a satisfactory subclass award for the remaining claimants. If these procedures prove unsuccessful, the court could compute an appropriate comparability formula as its own judgment or utilize one of the other classwide remedies discussed in *Pettway III*, *supra*, 494 F.2d at 260-63, and *United States Steel Corp.*, *supra*, 520 F.2d at 1055-56, taking care to articulate fully its findings and conclusions in support of the decree. *United States Steel Corp.*, *supra*, 520 F.2d at 1055. As a last resort the court may utilize the individual-by-individual approach discussed in section IV *supra*.[85]

CONCLUSION

Title VII is a vital, though sometimes unwieldy and inefficient, instrument in the long struggle of minority employees for equality of opportunity. This case presents a striking illustration of the limitations of a court, and particularly an appellate court, in resolving satisfactorily the complex and difficult issues that are raised in the Title VII context. The questions before us today have been at once highly technical and disturbingly elusive. They have required an examination of a voluminous and at times impenetrable record and have necessitated an exceedingly lengthy opinion. After twelve years in the courts and scores of pages of appellate consideration, we still cannot say with confidence that the end of this struggle is in sight. The temptation to enforce the compromises and remedial measures framed below and to put an end to this lengthy litigation has not been insubstantial. Nevertheless, it remains

[85]These subclass members would be entitled to proceed to Stage II if this alternative were utilized.

this court's task to ensure that the Title VII rights of ACIPCO's minority employees, who have been subjected to the scourge of racial discrimination, are vindicated. While we deplore contributing further to the seemingly Methuselean duration of this case, "we would not substitute one hour of efficiency for one moment of justice."[86] May this epoch ring down the curtain on this seemingly seamless epic.

The judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

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[86] *J. H. Rutter Manufacturing Co. v. NLRB*, 473 F.2d 223, 243 (5th Cir. 1973).

APPENDIX C

Order of Referral to Special Master, dated July 20, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

RUSH PETTWAY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION
	)	
AMERICAN CAST IRON PIPE	)	NO. 66-315
COMPANY,	)	Entered
	)	July 20, 1981
Defendant.	)	

ORDER OF REFERRAL TO SPECIAL MASTER

This matter having come before the Court on remand from the United States Court of Appeals for the Fifth Circuit, the Court having considered the opinion and mandate of that Court, and in particular the suggestion that the monetary claims herein may be referred to a Special Master, and the Court having considered the briefs and arguments of the parties,

It is hereby ORDERED, ADJUDGED and DECREED as follows:

(1) Pursuant to Rule 53, Federal Rules of Civil Procedure, this case is hereby referred to Honorable Gilbert Johnston, Sr., as Special Master, to conduct proceedings and determine which of the members of the class are entitled to receive monetary relief, if any, to calculate the amount of monetary relief, if any, and to take any and all such other actions as are specified and directed below.

(2) The Special Master shall be compensated for all fees, costs, and expenses incurred concerning this referral, the party responsible therefor to be determined by a subsequent order

of the Court. The Master shall be paid on an hourly basis at a rate hereinafter to be determined by the Court. To the extent practicable, the Master shall keep his time on an individual by individual basis, since that is the method that is to be utilized in the trial of this case for presentation of each particular class member's entitlement to back pay.

(3) The Special Master is specifically granted all necessary authority and empowered to achieve the aims embraced within the intent and purpose of this order and the mandates of the Court of Appeals including but not limited to the right to hear all discovery motions, to grant reasonable additional discovery to the parties, hold hearings, and administer any and all such other actions as may be necessary to carry out his duties in meeting the obligations to this Court. The Master is specifically empowered to enter orders pursuant to Rule 37, FRCP, including, but not limited to, all sanctions available under Rule 37(b).

(4) The subclass of persons eligible to have their claims adjudicated (claimants) are those black employees who have timely filed with the Court a notice of intent to participate in back pay determination. Class members meeting such criterion, who have previously accepted back pay tender offers and who are determined by the Special Master to be entitled to an adtional award, will be required to credit against the total award of back pay the amount previously accepted with interest thereon, calculated at the median prime rate paid by defendant on its borrowings, from the date of such acceptance to the date of the Special Master's determination. Nothing in this paragraph shall prohibit either party from pursuing further discovery or from filing additional motions with the Special Master prior to trial to attempt to further restrict or enlarge the subclass of back pay claimants.

(5) The Special Master, pursuant to Rule 53(d), FRCP, shall meet with counsel for the parties, within ten (10) days after August 3, 1981, and shall develop a schedule for progressing this case to trial through discovery and pretrial conferences. The Schedule shall provide for the completion of discovery suf-

ficiently in advance of the trial of this case. Prior to trial the Master shall enter a pretrial order specifying those claimants entitled to proceed. The pretrial order shall require the exchange of witness lists such that the parties will know at least twenty-four (24) hours in advance who is to testify the next day. The Special Master shall set the case for trial and determine the time, date and place of the individual hearings.

(6) The trial of this case shall be conducted by the Special Master in accordance with the Federal Rules of Evidence, and the Federal Rules of Civil Procedure. All witnesses who take the witness stand shall be examined under oath, and shall be subject to cross-examination. Proceedings before the Special Master shall be electronically transcribed. Any party may prepare therefrom a written transcript at its own expense. The Special Master shall have all powers of a federal district judge and as granted under Rule 53(c) in the conduct of the trial, subject to review by the Court. The Special Master shall have the right and authority to determine the validity of any and all defenses raised or proffered by the defendant, including those regarding the bona fides of the seniority system, business necessity, and any and all other such defenses that tend to define or eliminate claimants or subclasses of claimants.

(7) The Special Master may try the cases by subclasses. Each subclass may coincide with a department in defendant's plant. As each department comes up for trial all claimants working within each such department may be required to present their claims until all claimants in the department have been heard. At this time, the Special Master shall make his findings of fact and conclusions of law as to which claimants in the department have not met their initial burden of proof of entitlement to back pay. The Master shall report these findings and conclusions with the Clerk of the Court pursuant to Rule 53(e), FRCP, and the Clerk shall forthwith mail to the parties notice of the filing. The Master, in his discretion, may submit to counsel for the parties a draft of this report for purpose of receiving their suggestions, prior to filing. Subsequent to filing the Court shall determine, giving appropriate weight to the

Master's findings of facts, which claimants in the department have not met their initial burden of proof, and which are due to be dismissed under Rule 41 (b), FRCP.

(8) For all claimants who have met their initial burden, the burden will then shift to defendant to challenge each claimant's entitlement to back pay. Should defendant carry this burden, claimants will then have an opportunity to rebut defendant's case. At the conclusion of trial concerning each department, the Special Master shall make his findings of fact and conclusions of law and file same as his report in accordance with Rule 53 (e), FRCP, prior to proceeding to trial concerning claimants located in other departments. The trial may so proceed department by department until all claimants in all departments have been heard. The Court shall as soon as practicable, review the Special Master's reports and rule upon same. Nothing herein shall prohibit the Master from making reports prior to the trial of all claimants in a department, or from an agreement of the parties implementing or modifying the foregoing.

(9) The trial of this case shall proceed on an individual by individual basis as previously discussed. The Court imposes upon each individual claimant the burden of establishing his current position and pay rate, the jobs he was denied because of discrimination and their pay rates, a record of his employment history with the company that qualified him or would have qualified him for the denied positions and an estimation of the amount of requested back pay in accordance with the decisions of the Fifth Circuit Court of Appeals and the United States Supreme Court. As to any claimant who fails to meet his initial burden of proof, the Special Master shall specifically find where deficiencies existed and recommend dismissal of such claims pursuant to Rule 41 (b), FRCP.

(10) Within ten (10) days after being served with notice of the filing of any report pursuant to this order, any party may serve written objections thereto upon the other party. Application to the Court for action upon the report and upon objections thereto shall be made by motion and upon notice as pre-

scribed in Rule 6(d), FRCP. The Court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions, pursuant to Rule 53(e), FRCP.

(11) Subsequent to action by the Court upon the Special Master's reports with respect to the claimants in each department, the Court shall tax costs. At the conclusion of the Court's action awarding back pay as to claimants in each department, the Court will entertain a motion for interim award of attorneys' fees. The burden will be upon plaintiffs' counsel to furnish specific time records and prove a reasonable rate of compensation, plus expenses, for each individual claimant who prevails at trial, and proves entitlement to back pay. Evidentiary hearings on this matter shall be afforded to either party on request.

(12) The Special Master shall have the right to employ such administrative personnel and incur such other expenses as he deems necessary to accomplish the duties imposed on him by this order.

(13) Nothing in this order is intended as an expression of any opinion by the Court as to the merits of any of the claims or defenses asserted by any party in this case.

DONE this 20 day of July, 1981.

/s/ Seybourn H. Lynne

SENIOR JUDGE

APPENDIX D

Order of U.S. Court of Appeals, 5th Cir., dated August 19, 1981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 81-7647

IN RE:

RUSH PETTWAY, DAVIS JORDAN, ALEX FITTS and
All Others Similarly Situated,
Petitioners.

On Petition for Writ of Mandamus
to the United States District Court
for the Northern District of Alabama

(Filed August 19, 1981)

Before HILL, VANCE, and HENDERSON, Circuit Judges.

BY THE COURT:

The petition of Rush Pettway, Davis Jordan, Alex Fitts and all others similarly situated for a writ of mandamus is denied. This denial does not imply this court's approval or disapproval of proceedings presently under way in the Northern District of Alabama, in Cause No. 66-315, *Rush Pettway, et al. v. American Cast Iron Pipe Co.* It is clear that the interference in those proceedings by this court at this time would be premature and inappropriate.

IT IS FURTHER ORDERED that the stay issued by this court on August 7, 1981 is hereby dissolved.

APPENDIX E

Opinion of U.S. Court of Appeals, 11th Cir., dated July 15, 1982

A-211

Rush PETTWAY, et al., Plaintiffs-Appellants,

v.

AMERICAN CAST IRON PIPE COMPANY,
a Corporation, Defendant-Appellee.

Nos. 81-7605, 81-7689.

United States Court of Appeals, Eleventh Circuit.

July 15, 1982.

Black employees brought class action alleging employment discrimination. Following remand, 494 F.2d 211, the United States District Court for the Northern District of Alabama, at Birmingham, Seybourn H. Lynne, J., approved proposed settlement and overruled motions by dissatisfied class members, and appeal was taken. The Court of Appeals, Goldberg, Circuit Judge, 576 F.2d 1157, affirmed in part, reversed in part, and remanded. On remand, the United States District Court for the Northern District of Alabama, at Birmingham, Seybourn H. Lynne, J., ordered special master to proceed with determination of back pay on individual-by-individual basis, and appeal was taken. The Court of Appeals, Tuttle, Circuit Judge, held that trial court erred in ordering special master to proceed with determination of back pay on an individual-by-individual basis, with each employee carrying the burden of establishing that he had been denied a specific job or jobs for which he was qualified because of discrimination, since Court of Appeals had previously determined on appeal of the case that classwide basis of granting relief was to be considered by trial court and that each employee was required to provide only a statement claiming that he had been denied a specific job because of discrimination and that he was qualified for that job.

Vacated and remanded.

Appeals from the United States District Court for the Northern District of Alabama.

Before TUTTLE, RONEY and CLARK, Circuit Judges.

TUTTLE, Circuit Judge:

This is the fifth appeal of this case which originated in the District Court for the Northern District of Alabama in 1966. It involves a claim by plaintiffs, a class of all black employees and former employees of American Cast Iron Pipe Company (ACIPCO) of discrimination in promotion, tenure, and transfer opportunities on account of race. The trial court found generally in favor of the plaintiffs' claim of discrimination, but denied both an injunction and an award of back pay. Upon appeal, this Court affirmed the trial court's findings favoring the plaintiffs' class but found additional areas of discrimination. We remanded for the entry of an injunction and judgment for back pay. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (*Pettway III*).[1] In the course of our opinion in *Pettway III*, we emphasized the difficulties if the trial court should undertake to try the liability of the employer and the amount due to each employee on an individual basis. The class was stated to consist of approximately 2242 members. Noting that the black employees had been injured by requirements of non-validated tests, high school graduation (in some instances), promotions based on seniority within separate departments from some of which under the prior practice blacks were excluded entirely, and that the number of openings for which blacks might have competed but for the illegal restraints was less than the number of members of the class, we said:

> . . . There is no way of determining which jobs the class members would have bid on and have obtained if discriminatory testing, seniority, posting and bidding system, and apprentice and on-the-job training programs had not been in existence. Class members outnumber promotion vacancies; jobs have become available only over a period of time; the vacancies enjoy different pay rates; and a determination of who was entitled to the vacancy would have to be determined on a judgment of seniority and ability

[1]Pettway I and II dealt with procedural or collateral matters.

at that time. This process creates a quagmire of hypothetical judgments.

494 F.2d at 260.

We also said:

> However, when the class size or the ambiguity of promotion or hiring practices or the multiple effects of discriminatory practices or the illegal practices continued over an extended period of time calls forth the quagmire of hypothetical judgment discussed earlier, a class-wide approach to the measure of back pay *is necessitated*. . . . When a court is faced with the employment situation like this case, where employees start at entry level jobs in a department and progress into a myriad of other positions and departments on the basis of seniority and ability over an extended period of time, exact reconstruction of each individual claimant's work history, as if discrimination had not occurred, is not only imprecise but impractical.

Id. (footnotes omitted.) (Emphasis added.)

We then discussed possible means of proof of the amounts of back pay owed to the class as a whole and methods of properly distributing such amount among the members of the class and pointed to the suggestion of the Equal Employment Opportunity Commission's proposed formula as follows:

> While the appropriate formula should be decided by the Master after a hearing, this Court should instruct the Master that such formula should be based upon a class of whites which would be comparable to the members of the effective class but for the discrimination. By such a formula a determination of the gross award can be established without prohibitive expense within the physical and fiscal limitations of the Court. See *United States v. Georgia Power Co., supra,* 5 FEP cases at p. 598. Brief for the United States EEOC as amicus curiae at 47.

494 F.2d at 263.

The Court then stated:

> While the district court is not limited to this particular alternative, it has more basis in reality (i.e. actual advance-

ment of a comparable group not discriminated against) than an individual-by-individual approach.

Id.

Thus, in *Pettway III*, this Court clearly stated that in this type of case, a class-wide approach to the measure of back pay is necessitated. We also stated that it "has more basis in reality than an individual-by-individual approach." Finally, we stated in a case of this kind "exact reconstruction of each individual claimant's work history, as if discrimination did not occur, is not only imprecise but impractical."

Having then left open the possibility of the trial court's permitting the parties to arrive at the amount of back pay by agreement, we remanded the case to the trial court "for further proceedings not inconsistent with this opinion."

After remand, the parties negotiated for well over a year as to the terms of an injunction and a back pay settlement to carry into effect the mandate of this Court in *Pettway III*. The Court finally took over the drafting of the injunction which it included in its final judgment. After extensive negotiations, the parties worked out a proposed settlement of the back pay issue for submission to the Court. This settlement contemplated the paying of one million dollars to a subclass of 841 of the 2242 employees. It also included the payment of a substantial attorney's fee to the then counsel for the plaintiffs. Checks were drawn and issued to the members of the subclass. Some of them were cashed; some were rejected; some members, both among those who cashed their checks and those who rejected them, expressed their dissatisfaction with the settlement. Counsel urged the settlement and declined to appeal, even though dissatisfaction was expressed by 589 members of the subclass and by 150 other employees excluded from the subclass. All of the named plaintiffs remaining in the case opposed the settlement, as did the 589 members of the 841 persons subclass favored by the settlement. Nevertheless, the court entered the judgment. The court denied the request of the named plaintiffs to substitute counsel for Mr. Adams, who had negotiated the settlement. Nevertheless, present counsel appealed from

the order and judgment approving the settlement. This Court in *Pettway IV* reversed, 576 F.2d 1157, finding the trial court's injunction inadequate and concluding that the court abused its discretion in approving the back pay negotiated settlement. This Court concluded its discussion of the back pay problem by saying:

> On remand the court should reformulate the back pay subclass to include the 442 individuals who declined to accept the back pay tender and any other awardees who disaffirm their award in compliance with the procedures to be established by the district court. A number of options are then open to the court. Appellants in their brief indicate that if provided an opportunity for discovery and hearings to evaluate the adequacy of the settlement, the subclass members might be willing to accept their individual awards. In its discretion the court may wish to permit such discovery. The court might also encourage further settlement negotiations to arrive at a satisfactory subclass award for the remaining claimants. *If these procedures prove unsuccessful, the court could compute an appropriate comparability formula as its own judgment or utilize one of the other classwide remedies discussed in Pettway III, supra,* 494 F.2d at 260-63, and [*United States v.*] *United States Steel Corp., supra,* 520 F.2d [1043] at 1055-56, taking care to articulate fully its findings and conclusions in support of the decree. *United States Steel Corp., supra,* 520 F.2d at 1055. *As a last resort the court may utilize the individual-by-individual approach discussed in section IV supra.*

576 F.2d at 1222 (emphasis added) (footnote omitted).

After remand, considerable time and effort were spent between the parties at working out the details of a proper injunctive order in compliance with *Pettway IV*. These details were finally resolved and the court signed the injunctive order and stated that it would immediately go into the matter of back pay. Notices were mailed to each member of the class directing them to individually file a "notice of intent to participate in back pay determination." Approximately 1200 members of the class filed such notices with the court. Thereafter, the

plaintiffs and defendant undertook broad discovery efforts as a part of which class members answered interrogatories propounded to them by the defendant. These individually executed interrogatories were completed in April, 1981. Other discovery requests and motions are still pending before the special master subsequently appointed by the district court. The court appointed a special master to consult with the parties and attempt to work out a compromise settlement on back pay which was contemplated to be on a classwide basis. By its order of appointment the court apparently sought to give the plaintiffs an option of settling as a class or facing a solution of the back pay issue by a different special master on an individual basis. The court said:

> If a settlement is not concluded by July 1 the court would forthwith refer such issues to a special master, and that the order of reference would instruct the special master that the court imposes upon each individual claimant to back pay the burden of *establishing* his current position and pay rate, *the jobs he was denied* because of his discrimination and their pay rates, a record of his employment history with the company *that qualified or would have qualified him for the denied positions*, and an estimation of the amount of back pay. (Emphasis added.)

The master met several times with the parties but finally reported that he was unable to cause the parties to settle the dispute, and he was subsequently discharged by the court.

On July 16, 1981, plaintiffs filed a motion for an evidentiary hearing in which they could submit evidence in support of classwide methods of adjudicating back pay claims. Without passing on that motion, the trial court held a hearing of counsel on July 17 to discuss the various suggested orders of reference to a special master. At this hearing nothing was said by either party as to the issue of classwide approach to the back pay awards. Appellant's counsel did object to language in a proposed order that placed any "burden of proof" on the employees, calling attention to the difference between the proposed burden of proof in the proposed order and the absence

of any such burden in *Pettway III* and *IV*. The court stated it would adopt the language used by this Court in *Pettway IV*. The court included in its order of reference to the special master direction that the cases be disposed of on an individual-by-individual basis. It provided as follows:

> 9. The trial of this case shall proceed on an individual-by-individual basis previously discussed. The Court imposes on each individua plaintiff the burden of *establishing* his current position and pay rate, *the jobs he was denied because of discrimination* and their pay rates, a record of his employment history with the company *that qualified him or would have qualified him for the denied positions* and an estimation of the amount of requested back pay in accordance with the decisions of the Fifth Circuit Court of Appeals and the United States Supreme Court. As to any claimant who fails to meet his initial burden of proof, the Special Master *shall* specifically find where deficiencies existed and *recommend dismissal of such claims pursuant to Rule 41(b), FRCP.* (Emphasis added.)

It is this order of the trial court that is here on appeal. Appellants also complain that the district court abused its discretion in prohibiting the use of court reporters appointed pursuant to 28 U.S.C. § 753 during the back pay phase of the trial and that it also erred or abused its discretion in granting permission to the defendants to serve an offer of judgment directly on the individual class members.

The appellee first challenges the right of appellants to prosecute this appeal, contending that the trial court issued no "final" judgment as contemplated by 28 U.S.C. § 1291. With respect to the other issues appellee relies upon the contention that the trial court properly exercised its discretion.

APPEALABILITY

Courts of appeals of the United States have jurisdiction of appeals from all final decisions of the district courts of the United States. 28 U.S.C. § 1291. Other than jurisdiction granted to courts of appeals from certain interlocutory orders as granted under 28 U.S.C. § 1292 the finality requirement of

section 1291 governs except as modified by the Supreme Court's decisions in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) and *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964). In *Cohen*, the Supreme Court recognized a need to provide appeal in those situations where an order was not practicably remediable on final appeal. The Court held that the district court's refusal to order plaintiff in a shareholder's derivative action to post security for costs, required by a New Jersey statute, fell within "that small class which finally determined claims of right separable from, and collateral to, the rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546, 69 S.Ct. at 1225.

The Court of Appeals for the Fifth Circuit has discussed the meaning of *Gillespie v. United States Steel Corp., supra.* In *United States v. Mississippi Power & Light Co.*, 638 F.2d 899 (5th Cir. 1981), the Court said:

> [1] *Gillespie v. United States Steel Corp.*, 1964, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199, furnishes the analytical framework for determining whether these orders are final within the meaning of § 1291. As that case points out, "a decision final within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Id.* at 152, 85 S.Ct. at 310. Thus, although the withholding of injunctive relief and retention of jurisdiction by the district courts in these cases makes it possible that they will be called on to issue another order to enforce their decisions, that fact alone is not dispositive on the issue of finality. *Thoms v. Heffernan*, 2 Cir. 1973, 473 F.2d 478, *vacated on other grounds*, 1974, 418 U.S. 908, 94 S.Ct. 3199, 41 L.Ed.2d 1154.
>
> [2] Rather, *Gillespie* dictates that we give the finality requirement a "practical rather than a technical construction" and that the chief countervailing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." 379 U.S. at 152-53 [85 S.Ct. at 310-11] (quoting

> *Cohen v. Beneficial Industrial Loan Corp.*, 1949, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 and *Dickinson v. Petroleum Conversion Corp.*, 1949, 338 U.S. 507, 511, 70 S.Ct. 322 [324], 94 L.Ed. 299). With these considerations in mind, we conclude that the orders are sufficiently final to vest us with jurisdiction.

638 F.2d at 903.

Significant, also, to the consideration we give to the issue of appealability here is the further reason outlined in *Mississippi Power & Light Co., supra*:

> . . . These appeals are in effect a continuation of the first appeals. To resolve these issues now would impose no further inconvenience on the progress of this litigation. Indeed, refusal to decide these cases now would *create* cost and inconvenience without any benefit either to the party or to the orderly administration of the appellate system. . . .

Id. (Emphasis in original).

We now turn to the nature of the order which appellant seeks to present here for review to determine whether it meets the standards of *Cohen* and *Gillespie*, the latter as interpreted by the Court of Appeals for the Fifth Circuit by whose opinions decided prior to October 1, 1981, we are bound. As point-out out above, the trial court, without holding an evidentiary hearing, and without a discussion of the issue raised by plaintiff's motion therefor, referred all back pay questions to a special master declaring that they should be tried on an "individual-by-individual" basis. We have already, in effect, stated that to require each individual employee to prove his separate back pay entitlement is to require the impossible. We stated:

> There is no way of determining which jobs the class members would have bid on and have obtained if discriminatory testing, seniority, posting and bidding systems, and apprentice and on the job training programs had not been in existence. Class members outnumber promotion vacancies; jobs have become available only over a period of time; the vacancies enjoy different pay rates; and a determination of who was entitled to the vacancy would have to be determined on a judgment of seniority and ability

> at that time. This process creates a quagmire of hypothetical judgments.

494 F.2d at 260. We also stated that "a classwide approach to the measure of back pay is necessitated" and that "exact reconstruction of each individual claimant's work history, as if discrimination had not occurred, is not only imprecise but impractical." *Id.*

Thus, when the trial court ordered the special master to proceed with the determination of back pay on an individual-by-individual basis this, in effect, directed the plaintiffs into a cul de sac. When we said that the classwide approach was necessitated because it was impossible to determine the exact rights of each individual employee, we indicated to the trial court that it should make every effort to provide for a classwide approach to determine the total amount the affected class of black workers had lost on account of the illegal practices of the employer, and only if it was unable to find a method of determining this would it then "as a last resort" "utilize the individual-by-individual approach discussed in section IV, *supra*." 576 F.2d at 1222. The individual-by-individual approach may permit certain numbers of the whole class of 1200 to establish their individual claims, because of the peculiar clarity of the details of their employment records. It could not, under any circumstances, as we so clearly noted in our previous opinions, begin to provide for the recovery of an amount approximating the back pay lost by the entire class of workers. Most of them would not be able to "establish" the "jobs [they were] denied because of discrimination."

The effect of the trial court's order that is here appealed from, therefore, was in effect to kill the class recovery entirely, and leave open only some relatively small number of individual claims. We think this order met the test of finality as discussed in *Cohen, Gillespie*, and *Mississippi Power & Light Co., supra*.

In this claim by a class of black employees, which was originally filed in 1966, and in which the trial court properly found class standing and also found as early as 1971 that the class had

been discriminated against in several respects, but denied both injunctive and back pay relief, the issue of back pay has still not been decided. Under the order here appealed from it would be necessary for the special master to conduct 1200 separate trials on an individual-by-individual approach, unless he restricted the trials to the number of employees who have actually responded to interrogatories, some 850 (which appellants except to). While there is no evidence in the record, since the trial court did not permit any, counsel estimate that these proceedings, carried on apace, would take a minimum of five or six years to complete. Moreover, the expense to the plaintiffs, all low economic group wage earners, would be enormous. Of course, the expense to the appellee would also be great, but it is not here complaining on that score.[3] All together, it is difficult to see how to fault appellants' suggestion in their brief that the total cost of conducting the hearings on an individual-by-individual basis would be bound to exceed the total amount of back pay that could possibly be awarded. In an effort to lighten the out of pocket expense to the plaintiffs in conducting such hearings, the Equal Employment Opportunity Commission sought to intervene at this stage of the proceedings to assist in establishing the back pay award. This effort was frustrated by the court which denied the motion to intervene on the ground that it was too late. This order has been appealed and will be considered in a companion case. In making the comparison between "the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other," 379 U.S. at 152-53, 85 S.Ct. at 310-11, we conclude that the danger of denying justice by delay must prevail.

THE MERITS OF THE APPEAL

The appellants are not here to ask this Court to remand the case to the district court with directions that it try the back

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[3]However, the record reflects the fact that this employer is owned by its employees. It is apparent that useless expenditure of time and expense by ACIPCO would also injure the present employee plaintiffs pro tanto.

wage issue on a classwide basis. They complain only of the fact that, given the clear direction expressed in our two former decisions for a classwide resolution of the issue if possible, the trial court erred in not giving consideration to that solution. They also complain that the trial court could not properly determine the suitability of such a method of proceeding without hearing evidence as to the possibilities of shaping classwide relief. At the very least, they say the trial court erred in not assigning reasons for denying a form of procedure so clearly mandated by this Court.

In *Pettway III* we fully recognized the difficulties involved in arriving at a fair determination of back wages to which a class of employees are entitled because of their having been prejudiced by discriminatory promotion and transfer policies. However, we indicated several possible solutions of a classwide nature. *See* the discussion of averaging and of a comparability or representative employee earnings formula at 494 F.2d 262. We also stated that a comparability formula propounded by the Equal Employment Opportunity Commission "has more basis in reality (*i.e.*, actual advancement of a comparable group not discriminated against) than an individual-by-individual approach." 494 F.2d at 263. Presumably, also, there are expert witnesses available upon whom the plaintiffs would have depended if the trial court had granted their motion for a hearing on this issue. It is too early to consider the defendant's due process arguments until the dimensions and nature of class relief are at least presented by the experts. Tentatively, at least, we see no basis for such a contention so long as the court's final judgment is factually supported to the extent that the amount found due to the class does not exceed the amount which all members of the class together would have been entitled to receive under a correct hypothesis, which we must assume the trial court would adopt.

We conclude, as we have twice before, that a classwide basis for granting relief must be considered by the trial court. In order fairly to consider this question the court should give the parties an opportunity to present evidence touching on the

feasibility of such a method of relief. Unless the court determines that relief *cannot* be given upon a classwide basis, within the liberal concepts of allocation of burden of proof heretofore expressed in *Pettway III* and *IV*, it should proceed to determine the back pay issue on that basis. If it decides that relief cannot be given on such a basis, the court should state its reasons for such determination.

Finally, it must be pointed out that the trial court has failed to give effect to our decision dealing with the burden a class member is called on to carry. As noted above, the trial court's direction to the special master said: "The Court imposes on each individual plaintiff the burden of *'establishing' . . . the jobs he was denied because of discrimination*" and "a record of his employment with the company *that qualified him or would have qualified him for the denied positions.*" The maximum burden placed upon each plaintiff under the language of *Pettway III* and *IV* is quite different. "Therefore, the *maximum* (emphasis in original) burden that could be placed on the individual claimant in this case is to *require a statement of . . . the jobs he was denied because of discrimination . . .* a record of his employment history with the company and other evidence,[3] *that qualified or would have qualified him for the desired positions.*" 494 F.2d at 259.

Even though the court had not omitted the words "or other evidence" relating to the statement of the individual's qualifications the order appealed from placed on the employee the burden of *establishing, i.e., proving* that he had been denied a specific job or jobs because of discrimination and of *proving* that he was qualified. This greatly exceeds the maximum burden which this Court has twice stated requires only that the employee provide *a statement* claiming these facts. The language used in our prior decisions in this case to the effect that the maximum burden placed upon a member of the class "is to require a statement," etc. is precisely the burden that the Supreme Court described in discussing the burden placed on a

[3]The words "and other evidence" were omitted from the court's order of reference.

defendant in a Title VII case when the plaintiff had made a prima facie showing of discrimination. In *Bd. of Trustees of Keene State College, et al. v. Sweeney*, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978), the Court reversed a judgment of the Court of Appeals for the First Circuit which had stated that in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), the Supreme Court required "the defendant to *prove* absence of discriminatory motive." The Court said: "While words such as 'articulate,' 'show,' and 'prove,' may have more or less similar meaning depending upon the context in which they are used, we think that there is a significant distinction between merely "articulat[ing] some legitimate, non-discriminatory reason" and "prov[ing] absence of discriminatory motive."

Here, the trial court's statement that each individual employee must "establish" the jobs that he had lost and that he was qualified for has placed a different and much heavier burden on the employee than this Court has stated to be the proper burden. The requirement that the maximum burden is to require a *statement* of the essential facts is as different from the trial court's requiring a plaintiff to "establish" them as was the language of the First Circuit requiring that a defendant prove a non-discriminatory motive and the Court's much lighter burden of "articulating" such a defense. After remand to the Court of Appeals for the First Circuit and its remand to the district court for further proceedings in *Sweeney*, the Court of Appeals again affirmed the judgment of the trial court, and explained the manner in which it had construed the court's opinion and the manner in which the district court had proceeded in conformance therewith on remand. *See Sweeney v. Bd. of Trustees of Keene State College*, 604 F.2d 106 (1st Cir. 1979). It was therefore error for the trial court to require that each member of the employee class prove the specific jobs that he had been denied and to prove that he was qualified to fill such jobs and that he would have received them but for the discriminatory practices of the company.

Since, as we have indicated, we must vacate the trial court's

order of reference to the special master for the computation of damages on an individual-by-individual basis, we do not reach the further ground of appeal by appellants, complaining of the failure of the trial court to require that the hearings before the master be conducted in the presence of a regular court reporter. Since the nature of the reference to be made in the future may be entirely different in view of the requirement that such hearings be based on a classwide recovery if one is possible, we leave open for the trial court to consider at that time the propriety of the different forms of reporting and recording such hearings as may be required by a special master, if one is appointed.

Finally, the appellants complain of an order issued by the trial court at the time of the July 17 hearing granting a motion by the employer for "an order permitting it to serve, by mail, an offer of judgment, pursuant to Rule 68, Fed.R.Civ. P., upon each member of the putative back pay class in this action and further to permit said defendant, in the body of said offer of judgment, to reflect therein the defendant's position with respect to the reasonableness and validity of said offer, including information concerning other settlements of equal employment litigation in this locale; the amounts of money to date paid to attorneys who have and are representing members of the putative class; and the amount of back pay previously paid to the class members in 1975."

As will be seen, the only basis for defendant's claim to file the "offer of judgment," stated in the motions is Rule 68 Fed. R.Civ.P. This, of course, is a rule that provides that if an offer of judgment is tendered to a party by a defendant and is not accepted, but then the plaintiff subsequently thereto obtains a judgment that "is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." The costs in this case, as indicated above, would equal or exceed the total amount of back wages due. Such a Rule 68 offer of judgment has no provision for the inclusion of a brief on behalf of the offering defendant, dealing with such matters as "the reasonableness and validity of said offer, including information concerning other settlements of equal employment

litigation in this locality; the amounts of money to date paid to attorneys and the amount of back pay previously paid to the class members in 1975." These matters have no relevance to an offer of judgment under Rule 68.

However, on this motion filed by the defendant on July 14, the trial court, at the July 17 hearing, allowed no discussion of the merits of the motion but merely stated:

> There has been a motion filed by the defendant in this case for permission to serve upon each individual class member an offer of judgment. The motion contains a certificate that it has been served on Bob Wiggins, attorney for the class. That motion should be granted with a caveat that where reference is made to legal expenses incurred, it ought to include all legal expenses, not only the attorneys who have represented the plaintiff class but also the defendants because the employees of ACIPCO are owners of all of the stock. They are entitled to know, each individual, what has transpired in connection with negotiations, so I am granting that motion under the provisions of Rule 23(b) and the offer will be made to each member of the class. . . . so, Maebeth (deputy clerk) stamp that motion granted, and you can proceed immediately to mail out your offer settlement.

Thereupon counsel for the appellants stated: "Judge, before moving to another point, would it be appropriate to comment, or do you want us to save our comments?" To this the court replied: "Bob, I'm really not interested in any comments. I think it's so eminently fair that my mind is completely settled on that proposition." Thereupon the court granted the motion without permitting anybody to discuss the allegations in the motion, which was granted on a basis other than that upon which it was based. This order of the court was clearly based upon a representation by the defendant that counsel for the plaintiffs had improperly represented the class. The motion stated: "defendant is informed and believes that prior offers of settlement have not been adequately communicated or understood by the class members, said offer of judgment will not be fully communicated, and if communicated, understood by the

members of said putative class unless each said member of said putative class personally receives said offer of judgment containing a stated explanation of the defendant's position with regard to the validity and reasonableness of said offer, as well as statement of the sums of money already paid by the defendant in an effort to settle this action." Thus, the court granted the motion on the basis of Rule 23(d), which permits wide discretion in the trial court in the management of class actions as to notice to some or all of the parties, based upon allegations of bad faith conduct of counsel for the class, whom the court had thus far found to be adequately representing the employees.

Such an order, issued under such circumstances, is and must be held to be, a nullity.

There is nothing under Rule 68 which permits an offer of judgment, with the attendant sanctions against the successful plaintiff to be served upon the opposing party, rather than the party's counsel of record. Also, it was not in the form of an offer of judgment. Obviously, therefore, this motion could not have been granted under Rule 68. So far as it was an effort to undermine the confidence of the members of the class in the representation by their counsel of record, it could not be entered by the trial court without at least counsel having been given an opportunity to be heard on that important issue.

Since we have found jurisdiction to consider the appeal from the July 20th order of reference to the special master, we consider it appropriate to consider this order announced by the court during the hearing on July 17, although a separate notice of appeal was filed from that order.

The orders appealed from are VACATED and the case is REMANDED to the trial court for further proceedings not inconsistent with this opinion. We retain jurisdiction so that if either party is dissatisfied with the district court's order, on remand the matter can come back to the same panel. The trial court shall make findings of fact and conclusions of law and certify them to this court upon motion of either party. That course will promote efficiency and spare three other members

of this Court the task of wading through the thousands of pages of record that this dispute has engendered, is now engendering and, we fear, will engender in the future. The parties without further leave will have the opportunity to file supplemental briefs. *See Austin v. Parker*, 672 F.2d 508 (5th Cir., 1982).

The mandate shall issue forthwith.

APPENDIX F

Order of U.S. Court of Appeals, 11th Cir., dated September 27, 1982

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7605 & 81-7689
(consolidated)

RUSH PETTWAY, et al,

Plaintiffs-Appellants,

versus

AMERICAN CAST IRON PIPE COMPANY, a Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 15, 11 Cir., 1982, ____ F.2d ____).
(Filed September 27, 1982)

Before TUTTLE, RONEY and CLARK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney

United States Circuit Judge

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